No. 84-48-CFH
Status: GRANTED

Title: United States, Petitioner
v.
Hughes Anderson Bagley

Docketed:
July 10, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Hillier II, Thomas W.

Entry	Date	Note	Proceedings and Orders
1	May 18 1984		Application for extension of time to file petition and order granting same until July 10, 1984 (Rehnquist, May 22, 1984).
2	Jun 29 1984		Application for further extension of time to file petition denied (Rehnquist, July 5, 1984).
3	Jul 10 1984	G	Petition for writ of certiorari filed.
4	Aug 15 1984		DISTRIBUTED. September 24, 1984
5	Aug 20 1984	X	Brief of respondent Hughes A. Bagley in opposition filed.
6	Aug 20 1984	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Aug 22 1984		DISTRIBUTED. September 24, 1984. (Motion of respondent for leave to proceed in forma pauperis).
8	Sep 21 1984	P	Response requested. (Due October 22, 1984 - NONE RECEIVED)
9	Oct 10 1984		REDISTRIBUTED. October 26, 1984
12	Nov 5 1984		REDISTRIBUTED. November 9, 1984
13	Nov 13 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED.
14	Nov 13 1984		Petition GRANTED.
			**********
15	Nov 28 1984	G	Motion of respondent for appointment of counsel filed.
16	Dec 3 1984		DISTRIBUTED. December 7, 1984. (Above motion).
17	Dec 10 1984		Motion for appointment of counsel GRANTED and it is ordered that Thomas W. Hillier, II, Esquire, of Seattle, Washington, is appointed to serve as counsel for the respondent in this case.
18	Dec 31 1984		Brief amicus curiae of California filed.
20	Jan 2 1985		Order extending time to file brief of petitioner on the merits until January 11, 1985.
21	Jan 15 1985		Order further extending time to file brief of petitioner on the merits until January 18, 1985.
22	Jan 11 1985		Record filed.
23	Jan 18 1985		Joint appendix filed.
24	Jan 18 1985		Brief of petitioner United States filed.
25	Feb 5 1985		SET FOR ARGUMENT. Wednesday, March 20, 1985. (1st case).
27	Feb 11 1985		Order extending time to file brief of respondent on the merits until March 1, 1985.
28	Mar 4 1985		CIRCULATED.
29	Mar 1 1985	X	Brief of respondent Hughes A. Bagley filed.
30	Mar 12 1985		Lodging received. To be returned to the Department of Justice.
31	Mar 20 1985		ARGUED.

No. 84-48-CFH

Entry	Date	Note	Proceedings and Orders
32	Mar 11 1985	X	Reply brief of petitioner United States filed.

84-48

No.

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FILED
JUL 10 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

HUGHES ANDERSON BAGLEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
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QUESTION PRESENTED

Whether respondent's convictions should be set aside because the government failed to disclose, in response to respondent's pretrial request, evidence that respondent might have used to impeach two government witnesses, when it has been established beyond a reasonable doubt that the evidence would not have affected the verdict.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

HUGHES ANDERSON BAGLEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-6a) is reported at 719 F.2d 1462. The order of the district court (App., *infra,* 7a-9a) and the proposed findings and recommendations of the magistrate (App., *infra,* 10a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1983 (App., *infra,* 17a). A petition for rehearing was denied on March 2, 1984 (App., *infra,* 16a). On May 22, 1984, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to July 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent was indicted in the United States District Court for the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes.[1] In December 1977, after a trial without a jury, he was convicted on 11 counts of narcotics violations and acquitted on the other charges.[2] O'Connor and Mitchell, two private security guards who were also commissioned as state law enforcement officers, had aided the Bureau of Alcohol, Tobacco and Firearms (ATF) in its investigation of respondent and testified for the government at respondent's trial. Pet. App. 2a.

Before the trial, respondent sought discovery of, among other things, "any deals, promises or inducements made" to witnesses the government intended to call "in exchange for their testimony" (E.R. 9). Among the material respondent

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[1]Count I of the indictment charged that respondent was an accessory after the fact to various firearms offenses, in violation of 18 U.S.C. 3. Counts II and III charged that respondent distributed a controlled substance, and Counts VI-XIV charged that he possessed a controlled substance with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B). Count IV charged him with dealing in firearms and ammunition without being licensed to do so, in violation of 18 U.S.C. 922(a)(1) and 924(a). Counts V and XV charged him with possessing unregistered firearms, in violation of 26 U.S.C. 5861(d) and 5871. E.R. 1-7. ("E.R." refers to the Excerpt of Record filed in the court of appeals.)

[2]Respondent was found not guilty on Counts I, IV, V, and XV. He was convicted on Counts II and III. On Counts VI-XIV, he was found guilty "of the lesser-included crime of possessing the described controlled substances" (E.R. 31). On Count II he was sentenced to six months' imprisonment and a special parole term of five years. On Count III he was sentenced to a suspended term of three years' imprisonment and placed on probation for five years. On Counts VI through XIV his sentence was suspended and he was placed on probation for five years. E.R. 32. Respondent's probation was subsequently revoked when he was convicted of another offense, and he was sentenced to three years' imprisonment. App., *infra*, 10a; E.R. 119.

received in response to his discovery motions were affidavits by O'Connor and Mitchell. These affidavits, which were apparently furnished by the government in order to comply with respondent's request (E.R. 9) for "all Jencks Act material" (see 18 U.S.C. 3500), had been prepared during the investigation of respondent. They recounted at some length the dealings that O'Connor and Mitchell had with respondent on various occasions. See E.R. 64-85. Each affidavit contained the following recital: "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." E.R. 65, 66, 70, 72, 74, 77, 79, 82, 84.[3]

2. In 1980, respondent filed a motion to vacate his sentence under 28 U.S.C. 2255.[4] He alleged that the government had failed to disclose material that he could have used to impeach O'Connor and Mitchell. Respondent's motion was assigned to the same district judge who had presided over his non-jury trial and rendered the verdict.

After a hearing before a magistrate, the district court found (see App., *infra*, 7a) that in May 1977, O'Connor and

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[3]The court of appeals characterized these recitals as statements by O'Connor and Mitchell that each "had neither received nor expected compensation for his services" (App., *infra*, 2a). This description is exaggerated and inaccurate. The recitals, both literally and in context, represent only that the witnesses were not paid for giving their statements, not that they expected no compensation for the activities described in the statements.

[4]Respondent originally filed a petition for a writ of habeas corpus (see 28 U.S.C. 2241) in the Central District of California, where he was confined. This document was deemed a motion for relief under Section 2255 and transferred to the Western District of Washington. See E.R. 120. Apparently because respondent first sought a writ of habeas corpus, the warden having custody of respondent was named as the appellee in the court of appeals. The United States is the proper party adverse to the movant in a Section 2255 proceeding, and we have substituted the United States as petitioner in this Court.

Mitchell had each signed a blank form contract printed by the ATF. This form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor" (*id.* at 12a).[5] The district court found that these forms "reflected no description of services, no dollar amount, and no signatures on behalf of ATF. The Contracts were not signed on behalf of ATF until after the trial" (*ibid.*). O'Connor testified at the hearing on respondent's motion that he "signed many ATF forms during the course of the investigation" (*ibid.*), and the district court found that "neither O'Connor nor Mitchell remembers signing [the contracts]. * * * There is no evidence that either O'Connor or Mitchell read the Contract or retained a copy" (*ibid.*).

The district court further found that no representative of the government "ever promised future payment for their testimony, either to O'Connor or to Mitchell, except for nominal witness fees" (App., *infra,* 11a). The court also noted, however, that the ATF agent with whom O'Connor and Mitchell were dealing "might have told them, at the time they signed the Contracts, that he would attempt to secure some expense money for them" (*id.* at 12a). After the trial, this ATF agent initiated efforts to obtain compensation for O'Connor and Mitchell, and each received $300 (*id.* at 13a, 14a). On this basis, the district court concluded that "it appears probable * * * that O'Connor and Mitchell did expect to receive from the United States some kind of compensation, over and above their expenses, for their assistance, though perhaps not for their testimony" (*id.* at 7a).[6]

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[5]Respondent sought collateral relief after he had discovered these contracts by invoking the Freedom of Information Act and the Privacy Act, 5 U.S.C. 552 and 552a (App., *infra,* 2a).

[6]O'Connor and Mitchell also were paid a small amount of expense money — $90 and $80 respectively — before trial. The district court found that these payments "were intended to reimburse them" (App., *infra,* 14a) for "various expenses, including but not limited to automobile use and meals in the course of the investigation" (*id.* at 13a).

The form contracts were not disclosed to respondent before trial. The government attorney responsible for prosecuting respondent stated, in stipulated testimony, that he had not known of the unexecuted contracts and that he would have furnished them to respondent if he had known of them (App., *infra,* 13a).

3. The district court denied respondent's motion. It remarked that "[a]s the trier of fact in [respondent's] trial * * * this Court is in the unique position of being able to know what effect the disclosure of the ATF agreements with O'Connor and Mitchell could have had upon the decisions made by the Court in the criminal prosecution" (App., *infra,* 8a). The district court then ruled "beyond reasonable doubt that had the existence of the agreements been disclosed to it during trial that disclosure would have had no effect at all upon its finding that the government had proved beyond a reasonable doubt that defendant was guilty of the offenses" of which he was convicted (*ibid.*).

The district court explained the basis for its ruling as follows (App., *infra,* 8a):

> The Court has read in their entirety the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial * * *. Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The court found the defendant not guilty of those charges. With respect to the charges against defendant of distributing controlled substances and possessing controlled substances with the intention of distributing them, the testimony of O'Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that

the controlled substances in question came from supplies which had been prescribed for defendant's own use. As to that aspect of their testimony, the testimony of O'Connor and Mitchell tended to be favorable to the defendant.

4. The court of appeals reversed (App., *infra,* 1a-6a). It stated (*id.* at 5a-6a): "[W]e hold that the government's failure to provide [the] requested * * * information to [respondent] so that he could effectively cross-examine two important government witnesses requires an automatic reversal."

The court of appeals stated that respondent "was unaware during trial that O'Connor and Mitchell were subject to impeachment for bias based on their remunerative relationship with the government. The government's failure to disclose this * * * information inhibited [respondent's] ability effectively to cross-examine two important prosecution witnesses." App., *infra,* 4a. The court of appeals did not take issue with the district court's explanation of why such a disclosure would not have affected the verdict. Instead, the court of appeals emphasized the importance of cross-examination (*id.* at 4a-5a) and based its "automatic reversal" rule on its assertion that "a failure [by the government] to disclose requested * * * information that the defendant could use to conduct an effective cross-examination is [particularly] egregious because it threatens the defendant's right to confront adverse witnesses, and therefore, his right to a fair trial" (*id.* at 5a).

REASONS FOR GRANTING THE PETITION

The court of appeals has ruled that a conviction must automatically be set aside if the government failed to disclose requested information that might have been useful in impeaching a government witness, even if it is clear beyond a reasonable doubt that the information would have had no

effect on the outcome of the trial. This approach is flatly inconsistent with the decisions of this Court, which have repeatedly emphasized — even in connection with government failures to disclose that were far more improper than anything alleged here — that a conviction is not to be set aside unless there is a significant likelihood that the evidence in question would have affected the verdict. Indeed, in discussing evidence of the kind involved here — "evidence affecting [the] credibility" of a government witness — this Court has explicitly said: "We do not * * * automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .' A finding of materiality of the evidence is required." *Giglio* v. *United States,* 405 U.S. 150, 154 (1972) (citation omitted).

The court of appeals' approach would require defendants to be retried, often years after they were first convicted, for the sole purpose of permitting the use of evidence that —beyond a reasonable doubt — would not have affected the outcome of the first trial. In this way, the court of appeals' approach not only would impose wholly unnecessary costs on courts and the government but would enable some defendants — those who cannot be retried because the passage of time has adversely affected the government's case — to escape the consequences of a conviction that was the product of a wholly reliable verdict. Because the court of appeals' decision is manifestly in error and threatens to impose significant practical burdens on the administration of criminal justice, further review is warranted.

1. The court of appeals' "automatic reversal" rule appears simply to ignore the teachings of this Court's decisions. In a criminal prosecution, the government has a duty, under certain circumstances, to disclose information in its possession that could be useful to the defense. *United States*

v. *Agurs*, 427 U.S. 97 (1976); *Brady* v. *Maryland*, 373 U.S. 83 (1963). But the Court has repeatedly ruled that a violation of that duty does not "automatically" require that the defendant's conviction be set aside; the defendant is entitled to relief only if there is a sufficient likelihood that the evidence in question would have affected the verdict.[7]

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[7]It is far from clear that the prosecution breached any duty of disclosure or acted improperly at all in this case. Indeed, the district court appears to have avoided squarely ruling on whether the government should have disclosed additional information; it apparently preferred to rest its holding on the conclusion that respondent was not prejudiced even if the prosecution did err.

Respondent requested information concerning "any deals, promises or inducements made in exchange for the[] testimony" of O'Connor and Mitchell (App., *infra*, 13a; E.R. 9). The district court found that O'Connor and Mitchell were never promised payment by the government for their testimony (App., *infra*, 7a, 11a), and the court of appeals did not set aside this finding. The form contracts were not filled out and were not signed by ATF until after the trial. Thus, at the time of respondent's discovery motion, the contracts did not show that the witnesses had been promised any money at all — much less compensation (as opposed to expense money) for their testimony (as opposed to their other services).

The district court found only that it was "probable" that O'Connor and Mitchell "did expect to receive * * * some kind of compensation" (App., *infra*, 7a). Such a purely subjective expectation, of course, did not have to be "disclosed" in response to respondent's pretrial request. Moreover, the district court stated that O'Connor and Mitchell expected compensation "for their assistance, though perhaps *not* for their testimony" (*ibid.*; emphasis added). Respondent's pretrial request referred only to compensation for testimony.

The district court attached no significance to the fact that O'Connor and Mitchell received a small amount of expense money before trial (see page 4 note 6, *supra*). It is unclear whether the court of appeals believed that the government should have disclosed this information. In any event, the reimbursement of expenses was plainly not within respondent's discovery request.

Finally, as we noted above (page 3 note 3, *supra*), to the extent the court of appeals' opinion suggests that O'Connor and Mitchell made affirmatively misleading statements about the payments they had received and expected to receive, the court of appeals was incorrect.

For example, the Court has made it clear that even if the government knowingly uses perjured testimony in its efforts to convict a defendant — a vastly more egregious impropriety than anything alleged here (see *Agurs*, 427 U.S. at 104; *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935)) — the conviction should be set aside only "if there is a[] reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103 (footnote omitted). See *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959). On numerous other occasions, the Court has considered the claims of criminal defendants who seek to have their convictions set aside because the government failed to disclose, or otherwise suppressed, evidence that might have been helpful to the defense; the Court has repeatedly emphasized in these cases that a conviction will not be overturned when the evidence allegedly suppressed by the government was not material to the defense. See, *e.g.*, *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 866-872 (1982); *California* v. *Trombetta*, No. 83-305 (June 11, 1984), slip op. 9 & n.8; *Agurs*, 427 U.S. at 104-106, 108-113; *Goldberg* v. *United States*, 425 U.S. 94, 111 (1976); *Moore* v. *Illinois*, 408 U.S. 786, 795-798 (1972); *United States* v. *Augenblick*, 393 U.S. 348, 356 (1969); *Giles* v. *Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring); *Brady* v. *Maryland*, *supra*.

In this case, the government's demonstration that the evidence in question was not material met the most exacting standard; the district court found beyond a reasonable doubt that it would not have affected the outcome of the trial. The district judge who made this finding had himself been the trier of fact at respondent's trial, and he gave a cogent explanation of why his verdict would not have been affected. The court of appeals did not question this explanation or assert that the disclosure of the evidence in issue might have altered the verdict; it simply ordered a new trial,

six years after respondent's initial conviction, for the sole purpose of receiving evidence that — beyond a reasonable doubt — would not have affected the outcome of the first trial.[8]

The principal basis of the court of appeals' decision appears to have been its view that evidence that can be used to impeach a prosecution witness has a peculiar importance to the defendant. On its face, the premise that evidence useful only in impeaching a prosecution witness is more helpful to the defendant than directly exculpatory evidence is surely incorrect. And as we have noted, this Court has ruled several times that the government's failure to comply with a duty to disclose either directly exculpatory material or impeaching material does not "automatically" require the setting aside of a conviction.

The court of appeals relied heavily on *Davis* v. *Alaska*, 415 U.S. 308 (1974). But *Davis* is not a departure from the principle that the government's failure to disclose evidence cannot warrant a new trial if there is no significant likelihood that the evidence would have affected the outcome of the trial. In *Davis*, the Court reversed a conviction because

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[8]The court of appeals did not suggest that its disposition was needed to punish flagrant or repeated misconduct by the government. Even if the court of appeals had found such misconduct, it is at least open to serious question whether the court could have set aside respondent's conviction without applying a harmless error principle. See *United States* v. *Hasting*, No. 81-1463 (May 23, 1983). But in this case, it is, as we have noted, far from clear that the government acted improperly at all, and there is no suggestion of repeated or flagrant abuses (see page 8 note 7, *supra*).

Indeed, the very insignificance of the evidence suggests that the government would have seen little to be gained from deliberately withholding it. Moreover, the district court appears to have credited the prosecutor's testimony that he would have disclosed the form contracts to respondent had ATF informed him of them (see App., *infra*, 7a, 13a).

the defendant was prohibited from using in his cross-examination of Green, a crucial witness against him, the fact that Green was on probation as a juvenile delinquent. The Court in *Davis* summarized the significance of this evidence (*id.* at 311):

> [Defense] counsel made it clear that he would not introduce Green's juvenile adjudication as a general impeachment of Green's character as a truthful person, but, rather, to show specifically that at the same time Green was assisting the police in identifying [the defendant] he was on probation for burglary. From this [the defendant] would seek to show — or at least argue — that Green acted out of fear or concern of possible jeopardy to his probation. Not only might Green have made a hasty and faulty identification of [the defendant] to shift suspicion away from himself * * *, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation.

Elsewhere in the opinion in *Davis*, the Court described the evidence in a way that shows that the Court found the prohibition on its use highly damaging to the defense. See *id.* at 313-314, 318; *id.* at 319 ("Serious danger to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry."). It is entirely clear, therefore, that the Court's decision to set aside the defendant's conviction in *Davis* rested on its conclusion that the evidence the defense was barred from using would have been highly material and might well have affected the outcome of the trial.[9]

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[9]Not surprisingly, the court of appeals' decision here is in direct conflict with the decisions of other circuits. See, *e.g.*, *United States* v. *Farid*, No. 83-2261 (8th Cir. May 10, 1984), slip op. 4-5; *United States* v. *Sperling*, 726 F.2d 69, 72-73 (2d Cir. 1984); *United States* v. *Truong*

2. The court of appeals' approach, if it prevails, would impose substantial — and wholly unnecessary — burdens on the courts, the government, and law enforcement interests generally. Criminal defendants routinely make pretrial requests for information similar to that made by respondent. Government attorneys are of course made aware of their obligation to comply with appropriate requests; indeed, it will seldom be in the prosecutor's interest not to comply with such a request, because the disclosure of the information in the government's file will usually be far less threatening to the prosecution than the possibility that the conviction will be set aside, at some point in the future, if a mandatory disclosure is not made.

It is inevitable, however, that in a certain percentage of criminal prosecutions, government attorneys will erroneously fail to disclose information that should have been disclosed. This can occur for a number of reasons: there can be an inadvertent breakdown in communications, as apparently happened here and as can occur when different law enforcement agencies or different jurisdictions cooperate in an investigation; or an oversight can be caused by the time pressures associated with litigation and the limits on the government's resources. In addition, defendants' discovery requests are often not phrased with great precision, and a

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Dinh Hung, 667 F.2d 1105, 1107 (4th Cir. 1981), cert. denied, 454 U.S. 1144 (1982); *Zeigler* v. *Callahan*, 659 F.2d 254, 266-267 (1st Cir. 1981); *United States ex rel. Marzeno* v. *Gengler*, 574 F.2d 730 (3d Cir. 1978); *Calley* v. *Callaway*, 519 F.2d 184, 222 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976) ("[W]hen *Brady* is invoked to obtain information not favorable on the issue of guilt or innocence but useful for attacking the credibility of a prosecution witness, the information withheld must have a definite impact on the credibility of an important prosecution witness in order for nondisclosure to require reversal."). We know of no other court of appeals that has held that the government's failure to disclose requested information that could have been used to impeach a government witness requires that the conviction automatically be set aside.

prosecutor might, in good faith, interpret a request more narrowly than it is subsequently interpreted by a court entertaining a collateral challenge to the conviction. This case appears to illustrate these points as well (see page 8 note 7, *supra*).

If the government determines, during or after trial, that it may have breached a duty of disclosure, it will notify the defendant. See, *e.g.*, *United States* v. *Sperling*, 726 F.2d 69, 71 (2d Cir. 1984). In addition, prisoners are generally familiar with their rights under the Freedom of Information Act and the Privacy Act. Consequently, there is a reasonable possibility that erroneous failures to disclose information will ultimately come to the defendant's attention.

It can therefore be anticipated that the court of appeals' "automatic reversal" rule, if it prevails, will be applied in a substantial number of cases. Where the government's failure to disclose requested information has had the effect of depriving the defendant of a fair trial, he is of course entitled to have his conviction set aside. But under the court of appeals' approach, a conviction will be set aside even if it is clear that the evidence in question would not have affected the verdict. This approach serves no legitimate purpose; the costs it imposes on the courts and prosecutors that must retry the case are wholly unnecessary.

In addition, the court of appeals' approach will often, as here, require retrials many years after the events in question have occurred. Consequently, the court of appeals' "automatic reversal" rule is likely to enable some defendants who have been convicted after a fair trial at which all material evidence was available to escape retrial, or to obtain an unwarranted acquittal, because evidence has been lost, memories have faded, and witnesses cannot be found.

CONCLUSION

The petition for writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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JULY 1984

DOJ-1984-06

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-3303
CR No. 77-330V

HUGHES ANDERSON BAGLEY,
PETITIONER-APPELLANT,

v.

WALTER T. LUMPKIN, WARDEN,
RESPONDENT-APPELLEE.

Appeal from the United States District Court
For the Western District of Washington
Donald S. Voorhees, District Judge, Presiding

Argued and Submitted Feb. 7, 1983
[Decided Nov. 10, 1983]

OPINION

Before: SKOPIL, PREGERSON, and FERGUSON, *Circuit Judges*

PREGERSON, *Circuit Judge:*

Appellant Bagley, now on parole, appeals from the district court's order denying his 28 U.S.C. § 2255 (1976) motion to vacate, set aside, or correct his sentence. He contends (1) that the government's willful nondisclosure of impeachment evidence requested before trial denied him effective cross-examination of two key government witnesses, and (2) that the government's failure to disclose the requested information resulted in an uninformed and therefore unconstitutional jury waiver. We need address only the first of these contentions because Bagley failed to raise the jury

waiver argument below. *See United States* v. *Egger*, 509 F.2d 745, 749 (9th Cir. 1975). We reverse.

FACTS

Bagley was charged in a fifteen-count indictment with firearms and narcotics violations. On November 18, 1977, twenty-four days before trial, Bagley filed discovery motions requesting the prosecutor to disclose various items of information, including whether the government paid or promised compensation to any of its witnesses or informants. The government responded by providing affidavits from its key witnesses, James F. O'Connor and Donald E. Mitchell, each of whom stated that he had neither received nor expected compensation for his services.

O'Connor and Mitchell were commissioned Washington State law enforcement officers working as deputies for the Milwaukee Railroad during the Bureau of Alcohol, Tobacco, and Firearms (ATF) investigation of Bagley. Unknown to either Bagley or the district court judge during the bench trial, O'Connor and Mitchell had been informed by ATF Agent Prins that the ATF would attempt to pay them "expense money" in exchange for their investigatory services. In fact, O'Connor and Mitchell had each signed an ATF contract entitled "Contract for Purchase of Information and Lump Sum Therefor."

At trial, O'Connor and Mitchell testified about both the firearms and the narcotics charges. On December 23, 1977, the court found Bagley guilty on 11 counts of narcotics violations. He was found not guilty on the firearms charges.

In mid-1980, under the Freedom of Information and Privacy Acts, 5 U.S.C. §§ 552 & 552a (1982), Bagley discovered that O'Connor and Mitchell had in fact received money from the government both before and after the December 1977 trial. Bagley then filed the instant § 2255 motion and contended that the prose-

cutor's failure to produce information material to the credibility of key government witnesses violated his due process rights.

After an evidentiary hearing, the district court denied the motion. The court found, however, that O'Connor and Mitchell probably "did expect to receive from the United States some kind of compensation, over and above their expenses for their assistance, though perhaps not for their testimony." The court nonetheless found "beyond a reasonable doubt that disclosure of the ATF agreements would not have affected the outcome of the criminal prosecution."

DISCUSSION

The government acknowledges that upon specific request it has a duty to disclose evidence favorable to the accused. This is the basic principle of *Brady* v. *Maryland*, 373 U.S. 83 (1963). In *Brady*, the defendant asked the prosecution before trial to disclose a codefendant's extrajudicial statements relevant to their first-degree murder charges. Although the prosecution disclosed several statements, it withheld one in which the codefendant confessed to the actual killing. The Court ruled that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or the bad faith of the prosecution." *Id.* at 87.

In *United States* v. *Hibler*, 463 F.2d 455, 459 (9th Cir. 1972), this court underscored the government's "duty of candor" toward a criminal defendant. The prosecutor in *Hibler* had failed to disclose evidence from an independent, unbiased witness tending to support the defendant's version of the facts. In reversing the conviction, we stated:

> The test is whether the disclosed evidence was so important that its absence prevented the accused from receiving his constitutionally-guaranteed fair

> trial. That defense counsel did not specifically request the information, that a "diligent" defense attorney might have discovered the information on his own with sufficient research, or that the prosecution did not suppress the evidence in bad faith, are not conclusive; *due process can be denied by failure to disclose alone*. [Citations.]

Id. at 459 (emphasis added).

We articulated the test for determining whether the government's nondisclosure of *Brady* information requires reversal in *United States* v. *Goldberg*, 582 F.2d 483 (9th Cir. 1978). There we held that,

> [s]ince under the due process clause prosecutorial failure to respond to a specific request "is seldom, if ever, excusable," [*United States* v. *Agurs*, 427 U.S. 97, 106 (1976)], such a nondisclosure is properly analyzed as error; and it therefore follows that the reviewing judge should apply the harmless error standard, *see id.* at 111-12, 96 S. Ct. 2392; Fed. R. Crim. P. 52(a); *Chapman* v. *California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). As stated in *Schneble* v. *Florida*, 405 U.S. 427, 432, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972), the *Chapman* standard of "harmless beyond a reasonable doubt" requires a new trial whenever there is a "reasonable possibility" that the error materially affected the verdict.

Id. at 488-89 (footnote omitted).

In the case before us, Bagley was unaware during trial that O'Connor and Mitchell were subject to impeachment for bias based on their remunerative relationship with the government. The government's failure to disclose this *Brady* information inhibited Bagley's ability effectively to cross-examine two important prosecution witnesses.

In *Davis* v. *Alaska*, 415 U.S. 308 (1974), the Supreme Court held that the denial of the "right of *effective* cross-examination" was "'constitutional error of

the first magnitude'" requiring automatic reversal. *Id.* at 319 (emphasis added) (quoting *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1965)); *see also United States* v. *Uramoto*, 638 F.2d 84, 87 (9th Cir. 1980) (harmless error doctrine "inapplicable" where case involved "[d]eprivation of the right to a full and robust cross-examination of a paid Government informant").[1] In fact, effective cross-examination is so important in our legal system that Professor Wigmore described it as "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, *Evidence in Trials at Common Law* § 1367, at 32 (Chadbourn rev. ed. 1974).

Here, the district judge, who presided over the bench trial, concluded beyond a reasonable doubt that disclosure of the ATF agreement would not have affected Bagley's conviction. We disagree. Standing alone, the government's failure to produce requested *Brady* information is a serious due process violation. *Hibler*, 463 F.2d at 459. In fact, this failure is "seldom, if ever, excusable." *United States* v. *Agurs*, 427 U.S. 97, 106 (1976). But a failure to disclose requested *Brady* information that the defendant could use to conduct an effective cross-examination is even more egregious because it threatens the defendant's right to confront adverse witnesses, and therefore, his right to a fair trial. *See Davis*, 415 U.S. at 316-19.

For these reasons, we hold that the government's failure to provide requested *Brady* information to

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[1] Although the prosecution has advanced no valid reason for nondisclosure, it contends that its failure to respect Bagley's due process rights does not require reversal because O'Connor's and Mitchell's testimony was actually exculpatory on the narcotics charges, and Bagley would not have sought to impeach "his own witness."

The government's argument rests on a false premise. After reading the record, we conclude that O'Connor's and Mitchell's testimony was in fact inculpatory on these charges.

Bagley so that he could effectively cross-examine two important government witnesses requires an automatic reversal.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C80-1044V
(CR77-330V)

HUGHES ANDERSON BAGLEY, JR., PETITIONER,

v.

WALTER R. LUMPKIN, RESPONDENT.

ORDER

Having considered the petitioner's challenge to his conviction in Cause No. CR77-330V, pursuant to 28 U.S.C. § 2255, together with the transcript of the evidentiary hearing before Magistrate John L. Weinberg on January 18, 1982, the Proposed Findings and Recommendations for Disposition of Magistrate John L. Weinberg and the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial of petitioner before this Court in Cause No. CR77-330V, the Court now finds and rules as follows:

1. The Court adopts as its own the proposed findings 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of Magistrate John L. Weinberg. The Court cannot adopt proposed finding No. 15 as it appears probable to the Court that O'Connor and Mitchell did expect to receive from the United States some kind of compensation, over and above their expenses, for their assistance, though perhaps not for their testimony.

2. The Court adopts as its own proposed conclusion No. 16 of Magistrate Weinberg but finds that it cannot adopt proposed Conclusion No. 17.

3. The Court has read in their entirety the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial of Cause No. CR77-330V. Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The Court found the defendant not guilty of those charges. With respect to the charges against defendant of distributing controlled substances and possessing controlled substances with the intention of distributing them, the testimony of O'Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies which had been prescribed for defendant's own use. As to that aspect of their testimony, the testimony of O'Connor and Mitchell tended to be favorable to the defendant.

4. As the trier of fact in the trial of the defendant in Cause No. CR77-330V this Court is in the unique position of being able to know what effect the disclosure of the ATF agreements with O'Connor and Mitchell would have had upon the decisions made by the Court in the criminal prosecution.

5. The Court finds beyond reasonable doubt that had the existence of the agreements been disclosed to it during trial that disclosure would have had no effect at all upon its finding that the government had proved beyond a reasonable doubt that defendant was guilty of the offenses charged in Counts II, III and VI through XIV. The Court need not determine what effect that disclosure might have had with reference to the offenses charged in Counts I, IV and V because as to those counts the Court found that the government had not proven beyond a reasonable doubt that defendant was guilty of the offenses charged in those counts.

6. The Court finds beyond a reasonable doubt that disclosure of the ATF agreements would not have affected the outcome of the criminal prosecution.

Accordingly, the petitioner's motion must be and is DENIED.

The Clerk of this Court is instructed to send uncertified copies of this order to defendant at his place of confinement and to all counsel of record.

DATED this 12 day of May, 1982.

/s/ Donald S. Voorhees
DONALD S. VOORHEES
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. C80-1044V

HUGHES ANDERSON BAGLEY, JR.,
PETITIONER

v.

WALTER R. LUMPKIN,
RESPONDENT.

PROPOSED FINDINGS AND RECOMMENDATIONS FOR DISPOSITION

PRELIMINARY MATTERS

1. Hughes Anderson Bagley Jr. ("Petitioner") was convicted and sentenced in Case No. CR77-330V for distribution and possession of controlled substances. Portions of the sentence involved periods of probation. Eighteen months later, petitioner was convicted of new offenses in a separate case (CR79-108WTM), and the court revoked his probation in CR77-330V. The "Stipulation of Procedural History" filed in this case sets forth in full the proceedings in this court relating to petitioner through the end of 1981, and is incorporated by this reference.

2. Petitioner now challenges, pursuant to 28 U.S.C. § 2255, his original conviction in Case No. CR77-330V. In summary, he alleges that the United States failed to disclose to his counsel, despite proper discovery requests, that federal law enforcement officers had: (a) made payments prior to trial to two informants, whose testimony was crucial in petitioner's conviction; and (b)

promised those informants, prior to trial, that additional payments would be made at a later time.

3. Pursuant to this court's order, the parties participated in an evidentiary hearing January 18, 1982. These Proposed Findings and Recommendations for Disposition are based upon the testimony presented and exhibits admitted at that hearing, the stipulations on file, the arguments and memoranda of the parties, and the balance of the record.

CRIMINAL INVESTIGATION

4. Donald Mitchell and James O'Connor were, in April of 1977, employed as security officers with the Milwaukee Road. They were also state-commissioned police officers. They agreed to assist agents of the Bureau of Alcohol, Tobacco and Firearms ("ATF"), U.S. Department of the Treasury, in an investigation and possible prosecution of petitioner.

5. Pursuant to that agreement, beginning in April of 1977, O'Connor and Mitchell met on several occasions with petitioner, in at least four different locations. They negotiated for and purchased from petitioner firearms and controlled substances. They also participated in meetings with ATF Case Agent Norman Prins, and other ATF agents. In doing so, O'Connor and Mitchell incurred various expenses, including but not limited to expenses associated with the use of their personal vehicles and for meals.

EXPECTATIONS OF COMPENSATION, AND "THE CONTRACTS"

6. O'Connor and Mitchell dealt primarily with Agent Prins concerning all aspects of the investigation. Neither Prins nor any other representative of ATF or the United States ever promised future payment for their testimony, either to O'Connor or to Mitchell, except for nominal witness fees. This conclusion is based upon the consistent testimony to this effect by O'Connor,

Mitchell and Prins. O'Connor and Mitchell each testified that they were never promised, and did not expect to receive, any money in exchange for their testimony. Prins testified he told each of them that they could not expect any compensation. There was no testimony to the contrary.

7. O'Connor and Mitchell each signed, on or about May 3, 1977, a form entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor," ATF form 164-A ("the Contracts"). These forms were admitted as exhibits 1 and 2 at the hearing of January 18, 1982. Exhibits A-8 and A-13, which were not admitted, but to which witnesses referred in their testimony, are identical copies of exhibits 1 and 2 respectively.

8. When O'Connor and Mitchell signed the Contracts, they were printed forms on which none of the blanks had been completed, with the possible exception of the "Unique Identifier" number. The form reflected no description of services, no dollar amount, and no signatures on behalf of ATF. The Contracts were not signed on behalf of ATF until after the trial.

9. The printed language on the Contract provided that the individual signing it would provide information to ATF; and that, "... upon the accomplishment of the objective sought to be obtained by the use of such information," the United States will pay, "... a sum commensurate with services and information rendered;...." (exhibits 1 and 2).

10. While they acknowledge that their signatures are on the Contracts, neither O'Connor nor Mitchell remembers signing them. O'Connor testified he signed many ATF forms during the course of the investigation. There is no evidence that either O'Connor or Mitchell read the Contract or retained a copy. Agent Prins might have told them, at the time they signed the Contracts, that he would attempt to secure some expense money for them. But there is no other evidence

of any other promise or discussion or explanation of the Contracts.

PAYMENTS TO WITNESSES

11. O'Connor and Mitchell received payments from ATF through Prins, as follows:

Date Paid	O'Connor Received	Mitchell Received
4/28/77	$ 50	$ 40
5/3/77	20	20
5/12/77	20	20
1/4/78	300	300

In addition, each received reimbursement for funds paid to petitioner to purchase controlled substances and firearms.

12. The payments in April and May were intended to reimburse O'Connor and Mitchell for various expenses, including but not limited to automobile use and meals in the course of the investigation. O'Connor and Mitchell did not itemize their expenses. Prins arrived at the amount of the payments by his estimate of their expenses, as limited by available funds. All three believed the payments to be inadequate to reimburse O'Connor and Mitchell for their expenses.

13. Petitioner's trial took place in December of 1977. Prior to trial, defense counsel John Lundin formally requested the United States Attorney to furnish information as to "... any deals, promises or inducements made in exchange for their testimony." (Stipulation Regarding Testimony of John Lundin). He did not receive copies of the Contracts. AUSA F. J. Diskin would testify that, had he known of the Contracts in the form as they now appear, he would have provided them prior to trial. Lundin did receive Jencks material which included statements by O'Connor and Mitchell. Those statements included recitals that neither O'Connor nor

Mitchell had been promised any reward for making their statements.

14. Following petitioner's trial, Prins initiated the paperwork to provide additional, larger payments to O'Connor and Mitchell. He recommended $500 for each, and the Group Supervisor/Resident Agent concurred; but the Special Agent in Charge reduced the amount to $300 each (exhibits 3 and 4). These amounts are paid on January 4, 1978 (exhibits 5 and 6). Although in his testimony Prins characterized these payments as additional compensation for expenses, this is not borne out by the record. There is no documentation for expenses in these amounts. Mitchell testified this payment, unlike the earlier ones, was not for expenses. The paperwork by which Prins obtained authorization for the payments treats them as rewards, not reimbursement for expenses.

15. Neither O'Connor nor Mitchell expected to receive the payment of $300 or any payment from the United States for their testimony.

CONCLUSIONS

16. Payments to O'Connor and Mitchell prior to trial could not have furnished any basis for impeaching their trial testimony. These payments were relatively small in amount, and were intended to reimburse them for their expenses. Both witnesses, as well as Agent Prins, testified that the payments were inadequate to cover those expenses.

17. Because neither witness was promised or expected payment for his testimony, the United States did not withhold, during pretrial discovery, information as to any "deals, promises or inducements" to these witnesses. Nor did the United States suppress evidence favorable to the defendant, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963).

18. Petitioner's motion is therefore not supported by the evidence, and should be denied.

DATED this 22 day of February 1982.

/s/ John L. Weinberg
JOHN L. WEINBERG
United States Magistrate

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-3303

HUGHES ANDERSON BAGLEY,
PETITIONER-APPELLANT,

v.

WALTER T. LUMPKIN, WARDEN.
RESPONDENT-APPELLEE.

[Filed Mar. 2, 1984]

ORDER

Before: SKOPIL, PREGERSON, and FERGUSON, *Circuit Judges*.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-3303
DC CV 80-1044 DSV

HUGHES ANDERSON BAGLEY,
PETITIONER-APPELLANT,

v.

WALTER T. LUMPKIN, WARDEN,
RESPONDENT-APPELLEE.

JUDGMENT

APPEAL from the United States District Court for the Western District of Washington (Seattle)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and Entered NOVEMBER 10, 1983

VOL 21 PAGE 80

ORIGINAL

Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-48

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA

Petitioner,

vs.

HUGHES ANDERSON BAGLEY

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas W. Hillier, II
Federal Public Defender

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Assistant Federal
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Attorneys for Respondant

QUESTION PRESENTED FOR REVIEW

Whether Davis v. Alaska, 415 U.S. 308 1978 requires, without a showing of prejudice, automatic reversal of a conviction due to the failure of the government to disclose impeachment material.

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REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction to hear this case.

The Ninth Circuit Court of Appeals granted a Stay of Mandate on April 12, 1984, which reads as follows:

> On Motion of Respondent-Appellee United States, good cause having been shown to recall the mandate issued herein on March 12, 1984, and to stay reissuance of such mandant to permit the United States to petition for a Writ of Certiorari from the Supreme Court, it is hereby
> ORDERED that the mandate herein is recalled and reissuance thereof shall be stayed until April 24, 1984, such stay to continue thereafter pursuant to Rule 41(b) of the Fed. R. App. Proc. if a Petition for Writ of Certiorary has been lodged with the Supreme Court.

Fed. R. App. Proc. 41(b) states, in relevant part, that:

> If during the time period of the stay there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the Writ in that Court, the stay shall continue until final disposition by the Supreme Court.

The Stay of Mandate expired on April 24, 1984, since a notice from the Clerk of the Supreme Court, indicating that a Petition for a Writ of Certiorari had not been filed with the Clerk of the Court for the Ninth Circuit Court of Appeals. The Mandate has reissued, and this Court lacks jurisdiction to hear this matter.

II. The Opinion by the Ninth Circuit Court of Appeals is Correct and Does Not Warrant Review by this Court.

The opinion by the Ninth Circuit Court of Appeals is, we believe, correct. The opinion was based upon this Court's decision

in Davis v. Alaska, 415 U.S. 308 (1978). This Court recently quoted from Davis in United States v. Cronic, __ U.S. __, No. 82-660 (May 14, 1984), 35 Cr.L.Rep. 3061 (May 16, 1984), stating that "No specific showing of prejudice was required in Davis . . . because the petitioner had been 'denied the right of effective cross-examination' which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" 35 Cr.L.Rep. at 3064. By denying the right to effective cross-examination, "The right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing," 35 Cr.L.Rep. at 3063, is lost. The "Process loses its character as a confrontation between adversaries, [and] the constitutional guarantee is lost." Id.

CONCLUSION

We submit that the harmless error rule proposed by the government does not and should not apply to cases involving the denial of effective cross-examination. This position is, we believe, supported by this Court's decisions in Davis and Cronic. The rule proposed by the government would allow the prosecution to withhold relevant, discoverable evidence from the trier of fact and would render the adversarial process impotent. For these reasons the petition for a Writ of Certiorari should be denied.

Dated this 17th day of August, 1984

Respectfully submitted,

for: Michael G. Martin
Attorney for Respondent

CERTIFICATE OF MAILING

I certify that on August 17, 1984, I mailed a copy of the Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530.

for Michael G. Martin

SL 21 PAGE 80

ORIGINAL

FILED
AUG 30 1984
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-48

UNITED STATES OF AMERICA

Petitioner,

vs.

HUGHES ANDERSON BAGLEY

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

84-48

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

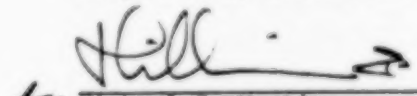
Respondent, Hughes Anderson Bagley, pursuant to Rule 46 and 18 U.S.C. § 3006A(d)(6), asks leave to file the attached Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs, and to proceed in forma pauperis. Respondent was represented by the Federal Public Defender in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Room 380
Seattle, WA 98101
(206) 442-1100

WHEREFORE, Respondent, by and through his undersigned counsel, respectfully prays that this Court grant leave to proceed in the Supreme Court of the United States in forma pauperis.

DATED this 17th day of August, 1984.

Respectfully submitted,



By: Michael G. Martin
Attorney for Respondent

No. 84-48

Office-Supreme Court, U.S.
FILED
DEC 31 1984
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

HUGHES ANDERSON BAGLEY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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No. 84-48

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

HUGHES ANDERSON BAGLEY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF STATE OF CALIFORNIA

In United States courts, criminal convictions for any recent year may

number approximately 36,000.[1/] Criminal convictions in the State of California for a similar period may exceed 230,000.[2/] The opinion below is purportedly based upon federal due process standards established by this Court in Brady v. Maryland (1963) 373 U.S. 83. (See Bagley v. Lumpkin (9th Cir. 1983) 719 F.2d 1462, 1463-1464.) As such, the principle established by the decision herein will of necessity apply to the States and heavily impact upon the judicial system of California.

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1. Statistics furnished by the Administrative Office of the Courts for the year ending June 30, 1984, indicate 36,104 convictions in federal felony and misdemeanor offenses, excluding petty offenses.

2. Statistics furnished by the Administrative Office of the Court of the Judicial Council of California for the year ending June 20, 1983, indicate 233,430 convictions in California felony and misdemeanor offenses, excluding petty offenses.

SUMMARY OF ARGUMENT

The opinion below creates a reversal per se rule in the case of any evidence which was not revealed to the defense in a criminal case pursuant to pre-trial "Brady motion" where that evidence might have been used to cross-examine prosecution witnesses. By ignoring the probable impact of the undisclosed evidence upon the outcome of the criminal proceeding, the opinion below disregards both past and recent decisions of this Court which clearly apply a harmless-error standard in such cases. Furthermore, it creates an unjustified windfall for criminal defendants who belatedly chance upon some undisclosed morsel, with a severe impact upon the judicial system and the concept of finality. Due process does not require absolute perfection in order to achieve a fair trial.

ARGUMENT

THE BELATED DISCOVERY OF UNDISCLOSED EVIDENCE DOES NOT REQUIRE RETRIAL OF A CASE WHERE THE EVIDENCE IS NOT EXCULPATORY AND NONDISCLOSURE IS CLEARLY NOT PREJUDICIAL.

In this case, the defendant made a pre-trial "Brady motion" seeking information including whether or not the Government had paid or promised compensation to witnesses or informants. (719 F.2d, at 1463.) In response, the affidavits of two principal witnesses--both of whom were state law enforcement officers assigned to work with a railroad--were filed in which the witnesses stated that neither received not expected compensation. (Id.) Some three years after conviction, utilizing the Freedom of Information Act (5 U.S.C. §§ 552, 552a), the defendant discovered that the Government had routinely agreed to reimburse both witnesses for expenses. (Id.) The trial court denied the defendant's motion for a new trial in a

post-trial proceeding (28 U.S.C. § 2255), "having concluded beyond a reasonable doubt that disclosure of the ATF agreements would not have affected Bagley's conviction." (Id., at 1464.) In reversing, the Ninth Circuit concluded that failure to disclose this information "inhibited Bagley's ability effectively to cross-examine two important prosecution witnesses" because they were "subject to impeachment for bias based upon their remunerative relationship with the government." (Id.) In essence, the opinion below holds that nondisclosure of any evidence "the defendant could use to conduct an effective cross-examination" requires reversal. (Id.) Yet such a standard is neither espoused by this Court, nor required to insure that a defendant will receive a fair trial.

The standard adopted by the Ninth Circuit--any diminution of the defendant's ability to cross-examine a witness denies due process of law--is tantamount to a "per se" reversal rule. (Cf. United States v. Valenzuela-Bernal (1982) 458 U.S. 858, 866.) Yet this Court long ago dispatched the notion that every nondisclosure of evidence deprives a defendant of a fair trial. In Giglio v. United States (1972) 405 U.S. 150, 154, this Court stated:

> "We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .' [Citation.]

> A finding of materiality of the evidence is required under Brady . . . ."

Later, in United States v. Agurs (1976) 427 U.S. 97, 108-110, which involved nondisclosure of the witness' criminal record, this Court commented:

> "The Court of Appeal appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the 'sporting theory of justice' which the Court expressly rejected in Brady. For a jury's appraisal of a case 'might' be affected by an

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improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury might be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of this files as a matter of routine practice.

". . . The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." (Footnotes omitted.)

This Court then declared (at 111-113):

"[T]he judge should not order a new trial every time he is unable to characterize nondisclosure as harmless under the customary harmless-error standard. Under that standard when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his 'conviction is sure that the error did not influence the jury, or had but a very slight effect.' [Citation.] Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.

"The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has not been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial."

The expression of the applicable principles in Agurs was recently reaffirmed in United States v. Valenzuela-Bernal (1982) 458 U.S. 858, 868. The requirement of "materiality" before nondisclosure affronts the Constitution was also noted in California v. Trombetta (1984) ___ U.S. ___, 81 L.Ed.2d 413, n. 8 at 422, and has been described by this Court as "the widely used standard for assessing motions for new trial based on newly discovered evidence" in Strickland v. Washington (1984) ___ U.S. ___, 80 L.Ed.2d 674, 697.

Though Strickland did not refer to California practices, it might well have. California has several procedural avenues for attacking a conviction on the basis of newly-discovered evidence. One of this is the statutory motion for a new trial which by definition is available on such a basis only "When new

evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (Cal. Pen. Code, § 1181(8), emphasis added.) "To entitle a party to a new trial on the ground of newly discovered evidence it must appear that the evidence is not merely cumulative, but is material, and that it is such as to render a different result probably on retrial . . . ." (People v. Sheran (1957) 49 Cal.2d 101, 111, 315 P.2d 5, 11; accord, People v. McDaniel (1976) 16 Cal.3d 156, 178, 127 Cal. Rptr. 467, 481, cert. denied, 429 U.S. 847; People v. Mattison (1971) 4 Cal.3d 177, 188, 93 Cal. Rptr. 185, 192.) A similar rule prevails where the new discovery of evidence is the basis for habeas corpus relief similar to the section 2255 relief sought by respondent Bagley here.

"[N]ewly discovered evidence does not warrant relief unless it is of such a character 'as will completely undermine the entire structure of the case upon which the prosecution was based.' [Citation.] [N]ewly discovered evidence will not undermine the case of the prosecution so as to warrant habeas relief unless (1) the new evidence is conclusive, and (2) it points unerringly to innocense." (In re Weber (1974) 11 Cal.3d 703, 724, 114 Cal. Rptr. 427, 433, cert. denied, 429 U.S. 847; accord, In re Hall (1981) 30 Cal.3d 408, 417, 423, 179 Cal. Rptr. 223, 230-231.)

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In evaluating the gravity of the error, California courts consider the context in which the error occurs, and, unlike the Ninth Circuit here, do not exalt technical violations in utter disregard of substance. As our highest court has noted: "In considering the materiality of the evidence, we must look to the entire record because materiality can only be determined in the light of the circumstances." (In re Ferguson (1971) 5 Cal.3d 525, 533, 96 Cal. Rptr. 594, 600.) "[T]he test . . . is an objective one based on all the evidence, old and new, whether any second trier of fact, court or jury, would probably reach a different result." (People v. Huskins (1966) 245 Cal.App.2d 859, 862, 54 Cal. Rptr. 253, 255; accord, People v. Clauson (1969) 275 Cal.App.2d 699, 706, 80 Cal. Rptr. 475, 480.) In this regard, California follows the lead

of this Court in United States v. Agurs (1976) 427 U.S. 97, 112-113:

> The "error" below concerned the nondisclosure of what at best might be termed marginally-impeaching evidence.[3/] In California, "As a general rule, 'evidence which merely impeaches a witness is not significant enough to make a different result probable.'" (People v. Green (1982) 130 Cal.App.3d 1, 11, 181 Cal. Rptr. 507, 514; People v. Huskins, supra, 245 Cal.App.2d at 862, 54 Cal.

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3. The two witnesses apparently signed what was a standard governmental contract, and the trial court found that they "probably 'did expect to received from the United States some kind of compensation, over and above their expenses for their assistance, though perhaps not for their testimony." (719 F.2d, at 1462.)

Rptr., at 255.)[4/] The California rule recognizes the fact--well-known to trial lawyers--that technically-impeaching evidence is seldom viewed as any more than that by either judge or jury. Certainly the "impeaching" value of the evidence which the Government did not disclose here was minimal.

Yet the scope of "error embraced by the Ninth Circuit is boundless. As this Court noted of the witness deported in United States v. Valenzuela-Bernal (1982) 458 U.S. 858, 866-867:

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4. California courts do distinguish those cases where the impeaching value of the evidence is so devastating that it totally destroys the credibility of the sole prosecution witness. (See People v. Williams (1962) 57 Cal.2d 263, 274-275, 18 Cal. Rptr. 729, 736; People v. Randle (1982) 130 Cal.App.3d 286, 293-294, 181 Cal. Rptr. 745, 749-750; People v. Huskins, supra, 245 Cal.App.2d at 863, 54 Cal. Rptr. at 255.)

> "Given the vagaries of a typical jury trial, it would be a bold statement indeed to say that the testimony of any missing witness could not have 'conceivably benefited' the defense. To us, the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel." (Footnote omitted.)

Similarly, almost anything--however inconsequential to the ordinary eye--may seem monumental to the fanciful cross-examiner. Hindsight speculation as to the possible utility of evidence cannot be the criterion for evaluating error; even the best counsel may disagree on

that point. (Cf. Strickland v. Washington (1984) ___ U.S. ___, 80 L.Ed.2d 674, 694-695. It has been California's experience that the significance of evidence looms larger in loss than in life. (See, e.g., People v. Harris (1976) 62 Cal.App.3d 859, 863, 133 Cal. Rptr. 352, 354.) Were a per se reversal rule to obtain, the significance of undisclosed evidence would no doubt receive similar post-conviction magnification.

What is worse is what the decision below portends for our judicial system. The larger the judicial system-- and California has perhaps the largest of all--the greater likelihood of error, not because the system is defective, but because it is staffed by human beings, a mortal quality of which is to err. California cases demonstrate the truism expressed in In re Imbler (1963) 60 Cal.2d 554, 567, 35 Cal. Rptr. 293, 300, cert.

denied, 379 U.S. 908, that "Police investigators, however, are not infallible . . . ." Thus we know of cases where an investigating officer erroneously believes that a witness statement was incorporated in his report, when in fact it was not and was therefore not disclosed (People v. Reyes (1974) 12 Cal.3d 486, 501-502, 116 Cal. Rptr. 217, 226), or where negatives are overlooked resulting in photographs which are not printed (People v. Harris (1977) 71 Cal.App.3d 959, 968, 139 Cal. Rptr. 788, 784). The prosecutor himself may overlook a statement in his own file, which consequently goes undisclosed. (People v. McGowan (1980) 105 Cal.App.3d 997, 1001, 166 Cal. Rptr. 725, 727.) These prospects never end. And neither does the hope of subsequently finding a miniscule shred of undisclosed evidence which serves as a guarantor of release

or reversal. Our highest court once stated that "[T]he claim of newly discovered evidence as a ground for a new trial is uniformly 'looked upon with disfavor,' for there must be an end to litigation." (People v. Williams (1962) 57 Cal.2d 263, 274, 18 Cal. Rptr. 729, 736.) The per se reversal rule of the Ninth Circuit, however, changes a criminal trial from a fair search for truth into the qualifying round of a treasure hunt.

Due process guarantees neither a successful outcome nor a letter-perfect defense. (People v. Wallin (1981) 124 Cal.App.3d 479, 484-485, 177 Cal. Rptr. 303, 306.) Or as this Court has observed, "A defendant is entitled to a fair trial but not a perfect one." (Lutwak v. United States (1953) 344 U.S. 604, 619.) The decision below demands otherwise.

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CONCLUSION

For the foregoing reasons, the State of California, as amicus curiae in support of petitioner United States, urges reversal.

DATED: December 28, 1984

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CERTIFICATE OF SERVICE BY MAIL

CHARLES R. B. KIRK, a member of the Bar of the United States Supreme Court, hereby certifies that on December 28, 1984, a copy of the Brief of the State of California as Amicus Curiau in support of Petitioner was served by mail upon the counsel of record for each of the parties respondent by depositing a copy in the United States Mail at the United States Post Office in the Federal Building, 455 Golden Gate Avenue, San Francisco, California, with first-class postage pre-paid, and properly addessed as follows:

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Office-Supreme Court, U.S.
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JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-48

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI
FILED JULY 10, 1984
CERTIORARI GRANTED NOVEMBER 13, 1984

27 pp & foldouts

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RELEVANT DOCKET ENTRIES
CRIMINAL DOCKET
U.S. DISTRICT COURT
BAGLEY, HUGHES ANDERSON (JR.)

OFFENSES CHARGED

18:3 accessory after the fact Ct I
21:841(a)(1), dist of controlled substances Sch IV
841(b)(1)(B) Ct II, III, IX, X, XII, XIII, XIV
18:922(a)(1), dealing in firearms and ammunition
924(a) without being licensed Ct IV
26:5861(d), 5871 poss of unreg firearm Ct V and XV
21:841(a)(1), poss w/int to dist controlled
841(b)(1)(B) sub Sche II Ct VI, VII, VIII, XI,

1977		
Oct 11	1	Filed magistrate papers including complaint, appearance bond, $5,000. corp surety bond dated May 13, 1977.
Oct 11	2	Filed indictment.
Oct 11	3	Filed order fixing bail at $5,000. c/cs. Summons to be issued.
Oct 11	4	Filed praecipe for summons returnable October 19 at 9 AM. Issued summons.
Oct 17		Issued bench warrant for failure to comply with requirements of bond (sign in) per request for Diskin at direction of Mag. Weinberg.
Oct 17		Ent initial hearing on bench warrant for failure to sign-in as required by bond. Bail raised to $20,000. c/cs. Weapon and ammo now in defts personal property pending arrangements made by defense counsel to have someone other than deft pick them up.
Oct 19		Ent A & P of not guilty. TRIAL 12-12-77 AT 9:30. Pretrial motions due three weeks. Bail hearing set for 11:30 today.
Oct 25	5	Filed return on warrant, arrested Oct 17.
Oct 25	6	Filed return on summons, unexecuted.
Oct 27	7	Filed agreement to supervise deft.
Oct 27	8	filed appearance bond, $15,000. unsec PR.

Nov 18	9	Filed marshal's return on subpoena to testify Landis John Emond, Steven Loring
Nov 18	10	Filed deft Bagley's motion for severance to quash search warrant and suppress evidence, to dismiss Count IV, to suppress evidence, to dismiss Count I and to consolidate or dismiss Counts V through XV.
Nov 18	11	Filed deft Bagley's motions for discovery and for bill of particulars.
Nov 18	12	Filed notice of hearing, December 2.
Nov 18	13	Filed return on subpoena, Donald Mitchell.
Nov 23	14	Filed deft Bagley's brief in support of motions for discovery, bill of particulars, severance, quash search warrant and other motions.
Nov 23	15	Filed appli & Order for writ of habeas corpus ad test returnable Dec 12 at 9 AM of Raymond F. Hurley, Harrison Keith Millard, and Howard Nordyke. Issued writs.
Nov 30	16	Filed plntff's requested instructions.
Nov 30	17	Filed Govt's response to pretrial motions.
Nov 30	18	Filed order on defts motions severing Count I of the indictment for trial from Counts II through XV of the indictment; denying defts motion for bill of particulars, denying defts motion to suppress the evidence seized on or about May 12, denying defts motion to dismiss Count I and denying defts motion to consolidate or dismiss Counts VI through XV. Copies to counsel.
Dec 2	19	Filed additional material re: Govt's response to defts pretrial motions.
Dec 2	20	Filed praecipe for 25 regular and 10 duces tecum. Issued.
Dec 2	21	Filed defts motion to require fingerprint analysis and affidavit.

Dec 2	22	Filed defts motion for reconsideration of Court's Order on suppression of evidence seized on or about May 13, 1977.
Dec 2	23	Filed brief in support of defts motion for reconsideration.
	24	Filed affidavit in support of.
Dec 2	25	Filed notice of hearing, December 7 at 9 AM.
Dec 5	26	Filed Govts motion for reconsideration of Court's Order severing Count I of the indictment.
Dec 2		Ent order placing defts motion for discovery and bill of particulars, for severance to quash search warrant and suppress evidence, to dismiss Count IV, et al under submission.
Dec 6	27	Filed return on subpoena, Kathy Millard.
Dec 7	28	Filed Govts trial brief.
Dec 7	29	Filed Govts response to defts motion to reconsider suppresison of evidence.
Dec 8	30	Filed Govts exhibit list.
	31	Filed Govts witness list.
Dec 8	32	Filed praecipe for 10 subpoenas.
	33	Filed Supplemental brief of Bagley in support of defts motion for reconsideration.
Dec 8	34	Filed affidavit in support of motion for reconsideration
Dec 9	35	Filed defts trial brief.
Dec 9	36	Filed return on subpoenas to produce, William Knapp, John Jerentowski.
Dec 9	37	Filed return on subpoenas, James P. O'Connor, Joannie A. Vermrire, Randy Reed, Stewart R. McCurdy
Dec 9	38	Filed return on writ, Howard Nordyke.
Dec 9	39	Filed return on subpoena, Carol Emond.
Dec 9		Ent hearing on defts motion to Suppress. Court reporter—Bill Mayrand Court reserves ruling on motion to morning of trial December 12. Deft at liberty.
Dec 9		Ent order placing plntffs motion for reconsideration under submission.
Dec 12	40	Filed Govts supplemental exhibit list.

Dec 12 ENT 1ST DAY OF COURT TRIAL.
Court denies motion to suppress.

Dec 13 ENT 2ND DAY OF COURT TRIAL.
Exhibits.

Dec 14 41 Filed return on subpoenas, Byron Barton and Robert Dries, Donald E. Mitchell, James P. O'Connor

Dec 14 ENT 3RD DAY OF COURT TRIAL.
Exhibits.

Dec 15 42 Filed return on subpoenas, Howard Nordyke and T. M. Cook.

Dec 15 ENT 4TH DAY OF COURT TRIAL.
Court denies defts motions for suppression, dismissal, and to exclude exhibit 12.

Dec 16 Ent 5th DAY OF COURT TRIAL. CON'T TO 12/19/77 9:30

Dec 19 43 Filed marshal's return on subpoena to testify to John Bruce, Arnold Porter

Dec 19 44 Filed deft Bagley's decision to testify

Dec 19 ENT 6TH DAY OF COURT TRIAL.

Dec 20 ENT 7TH TRIAL—court Pltf's exhibits No 62 & 100 are withdrawn. After hearing argument Counsel Court takes case under advisement. Court will render decision on Dec 23, 1977 at 11:00 am Pltf's exhibits A-1, A-2, A-4, A-5 & A-7 admitted.

Dec 22 45 Filed marshal's return on subpoena to produce to Manger, Butch's Archery & Gun Shop

Dec 21 Ent conference on bond conditions before Mag. Sweigert. Defts condition that he not associate with wife & child stricken. $15,000. unsec corp surety bond exonerated. Lundin to submit order for Court's signature of the above.

Dec 23 Ent Court's Decision on Trial.
Court finds the deft not guilty to Count I, IV, V & XV. Court finds the deft guilty to Counts II, III, VI thru XIV of posesssion. Sentencing set for January 20 at 9:30. All exhibits pertaining to not guilty counts to be withdrawn. Deft at liberty on bond.

Dec 27 46 Filed Judgment on Decision by the Court.
Count I—Not Guilty
Ct II & III—Guilty
Ct IV & V—Not Guilty
Cts VI thru XIV—Guilty of the lessor-possession
Ct XV—Not Guilty.

1978

Jan 19 47 Filed return on writ, Harrison Keith.

Jan 20 SENTENCE: on Cts II, III, VI thru XIV
Count II—Deft is comm to Atty Gen for six months with a special parole of five years.
Count III—Deft is comm. to Atty Gen for 3 yrs, ESS, deft placed on probation for five years.
Count VI thru XIV—ISS, and deft placed on probation for five years.
Court sets appeal bond at $75,000.00 cash or corp. surety. Deft remanded.

Jan 24 48 Filed and ent Judgment and Commitment.

Jan 20 49 Filed return on J & C.

Feb 2 50 Filed defts notice of decision not to appeal.

Feb 24 51 Filed reporter's transcript of December 13 and December 19.

Mar 15 52 Filed motion and order withdrawing exhibits. 3-17-788 exhibits returned to Jerry Diskin.

Apr 14 53 Filed Motion of deft Bagley to reduce sentence.

Apr 14 54 Filed affidavit of deft in support of Rule 35 motion

Apr 14 55 Filed memorandum in support deft's Rule 35 motion.

Apr 25 Ent hearing on defts modification of sentence. Court recommends that the deft serve the balance of his sentence on work-release. Deft remanded.

May 3 56 Filed transcript of proceedings of April 25, 1978.

May 2 57 Filed modification of sentence—Court recommends remainder of sentence to be served at a work release facility.

Oct 20	58	Filed return of Writ of Habeas Corpus Ad Testificandum of Howard Nordyke.
1979		
Mar 29	59	Filed Order for issuance of bench warrant for the arrest of Hughes Anderson Bagley, to be held w/o bail. Issued warrant. CC: Prob & USAM
Mar 30		Ent. Initial hearing on probation revocation (JLW) Deft present w/ counsel Tom Hillier Preliminary hearing on probation revocation set for 4-9-79 at 11:00 a.m. before Mag. Sweigert.
Mar 30	60	Filed Order appt. Tom Hillier as counsel
Apr 3		Ent. BOND HEARING before Judge Voorhees Court Reporter—Vern Sorensen Counsel & deft present. After hearing the argument sof counsel the sworn testimony of Chris Larson, the Court sets bail at $200,000.00 c/cs. Mr. Diskin to prepare order.
Apr 5		LODGED Order imposing conditions of release—bond to be set at $200,000.00 c/cs
Apr 5	61	Filed and Ent. Order Imposing conditions of release. Bond set at $200,000.00 c/cs. copies to counsel and USAM. and Prob.
Apr 9	62	Filed marshal's return on probation warrant for deft Hughes Bagley. Deft arrested 3-29-79
Apr 9		Ent. Preliminary Hearing on Probation Revocation before U.S. Magistrate Philip K. Sweigert. Tape S137 & S138. Deft present w/ counsel. Deft in custody per Order of Judge Voorhees—to be held w/o bail. U.S. Probation Officer— Bob Thornton, present to present U.S. See Reverse for details
Apr 13		PRELIMINARY HEARING ON Probation Revocation exhibits #1 & 2 admitted. Testimony by USPO Bob Thornton, ATF Agent Smith. Court found probable cause to believe offense charged was committed by deft. Exhibits 1 & 2 withdrawn.

Apr 13	63	Filed Summary report of U.S. Magistrate of Preliminary hearing on probation revocation. The matter is bound over for a final revocation hearing, at a time to be arranged.
Apr 23	64	filed praecipe for issuance of 5 subpoenas ad testificandum for probation revocation hearing before Judge Voorhees on April 30 at 2:00 p.m. Issued in duplicate and in blank.
Apr 24	65	filed praecipe for 2 subpoenas for trial. Issued in duplicate (for Govt).
Apr 26	66	Filed Marshal's return of the following subpoenas to testify: (a) Mervin Haptonstall (b) Robert Costie (c) Chris Larson (d) Willard Lewis (e) Paul Good (f) Harry Van Tassel
Apr 27	67	Filed Deft's motion for discovery
Apr 27	68	Filed Affidavit of Thomas W. Hillier, II
Apr 27	69	Filed Deft's motion to shorten time for noting motions
Apr 27	70	Filed Deft's notice of motion—April 27, 1979
Apr 27	71	Filed marshal's return of subpoena to testify for Linda Haptonstall.
Apr 30		Ent. REVOCATION OF PROBATION HEARING before Judge Voorhees. Court Reporter—Vern Sorensen Deft present w/ counsel. Court Denies Deft's motion for continuance. Hearing cont to May 11 at 3:00 p.m. Exhibits 1 thru 10 are admitted. Exhibits withdrawn.
May 2		Ent. Rev. of Prob Hearing set for May 11 is CONTINUED to *May 14th* at 2:00 p.m. due to conflict of counsel. Counsel notified.

May 14		Ent HEARING on Probation Revocation. Ct Rpr: Vern Sorensen. Deft and counsel present. After hearing testimony of witnesses for pltf and deft—Crt cont hearing to Thurs. 5-17-79 at 10:00 a.m.
May 17		Ent. REVOCATION OF PROBATION HEARING—Ct Rptr: Vern Sorensen. Deft present w/counsel. Court finds grounds for revoking prob. Court will announce decision at 9:30 a.m. July 13th Deft remanded.
Jul 13		Court's decision on revocation hearing cont to July 20 at 9:00 a.m.
Jul 20		Ent. Court's decision on probation revocation con't to August 1, 1979 at 4:15 PM
Aug 1	72	RECOMMENDATION Deft's re: Disposition
Aug 1		Ent. REVOCATION OF PROBATION Before Judge Voorhees, Ct Rptr: Vern Sorensen Deft present w/counsel Sentence: Ct III Deft Comm 3 yrs Impr., to run consecutive to sent imposed by Special Parole Board on Ct II. Deft waives appearance at signing. Deft remanded.
Aug 2	73	ORDER Revoking probation and imposing sentence. Iss copies
Aug 20	74	MOTION under 38 USC: 2255 by deft Bagley. copies to Judge Voorhees and AUSA. *Civil Case No. C79-968V*
Aug 28	75	REQUEST Deft's for appt of counsel
Sept 4	76	ORDER appt FPD as counsel for petitioner Bagley
Sept 5	77	ORDER auth payment to Tom Hillier in the amt of R695.00.
Sept 5	78	AFFIDAVIT John Lundin's in support of petitioner's 2255 motion.
Sept 10	79	MOTION *et Parte* (Deft's) for transcript.
Sept 18	80	TRANSCRIPT of proceedings on December 9, 1977 at 2:30 p.m. before Judge Voorhees Original only.

Sept 21	81	TRANSCRIPT of proceedings commencing on April 30, 1979 at 2:00 p.m. Orig and 1 copy
Oct 1	82	APPLICATION & ORDER for writ of habeas corpus ad testificandum for deft Bagley on 10-12-79 at 2 PM Issued writ
Sept 27	83	ORDER that evidentiary hearing will be held on 10-12 at 2 PM. US directed to file answer to petition by 10-5
Sept 17		ORDER CON'T: Any response to govt's answer shall be filed by 10-11-79 copy to counsel
Sept 28	84	PRAECIPE For subpoenas to testify in evidentiary hearing Issued in blank.
Oct 2	85	RESPONSE Govt's to motion to vacate, set aside or correct sentence.
Oct 12		EVIDENTIARY HEARING on 2255 motion before Judge Voohees Ct Rptr: Vern Sorrensen Petitioner present w/counsel Court takes matter under submission.
Oct 16	86	ORDER Denying petitioner's mot to vacate, set aside or correct sentence. Copies to counsel.
Nov 6	87	ORDER auth Vern Sorensen (Ct Rptr) payment for transcript of prob revoc hearings in amt of $97.50.
Dec 4	88	RETURN Marshal's at Writ of Habeas Corpus Ad Testificandum. Deft delivered to King County Jail at Seattle 10-9-79. Deft delivered to USP McNeil 11-20-79.
1980		
Feb 5	89	MOTION Bagley's to set aside Judgment in Order to correct a clerical error and restore the Petitioner's right of appeal.
Feb 5	90	NOTICE of mtn—2-15-80
Feb 5		Lodged Judgment
Feb 15	91	JUDGMENT For reasons stated in Court's order of Oct 16, 1979, Clerk directed to ent judgment for United States.
Feb 15	92	JUDGMENT ent in favor of the United States, respondent.

Oct 21	102	AFFIDAVIT deft's, in support of mtn for discovery.
Oct 21	103	NOTICE deft's, of mtn for discovery
Oct 21	104	CERTIFICATE deft's, of service by mail (all 10-21-80 documents)
Oct 21	105	MEMORANDUM deft's, of points & authorities in support of 2255 motion
Oct 31	106	MOTION Govt's for extension of time w/in which to answer.
Nov 7	107	ORDER granting plntff's motion for ext of time w/which to file its answer to deft's motion pursuant to Title 28 § 2255. cc: cnsl
Nov 26	108	TRANSCRIPT testimony of James P. O'Connor 12-12-77
Nov 26	109	ANSWER govt's, to petitioner's 2255 mtn
Dec 11	110	REPORTER'S TRANSCRIPT original only, of proceedings before DSV 12-13-77 (transcript forwarded to JLW per court reporter)
Dec 13	111	TRAVERSE petitioner's, to govt's response pursuant to 2255
Dec 13	112	NOTICE petitioner's, of service by mail of doc #111
May 15	113	JUDGMENT (CCA) affirming lower court decision cc: cnsl, USMO, USPO, DSV
Sept 24	114	ORDER (DSV) adopting report & recommendation; remanding case to JLW, FPD apptd to represent petitioner; mtn for discovry is stricken.
Oct 16	115	APPLICATION & ORDER (PKS) for writ of H/C ad testificandum to appear 11-2-81, 11 AM, JLW
Nov 20	116	LETTER to cnsl from JLW re: schedule as to discovery mtn; 11-30-81, response from govt to deft's discovery request; 1-18 & 1-18, 1982 Evidentiary hrg.
Dec 2	117	ORDER (JLW) extending time to complete discovery to 12-7-81.
Dec 7	118	STIPULATION of procedural history
Dec 8	119	MOTION deft's ex parte for order directing USMO to transport petitioner

Dec 8	LODGED Order directing USMO to transport deft
Dec 8	120 AFFIDAVIT deft's, in support of mtn for order to transport deft
Dec 10	ENT (DSV) Court DENIES petitioner's mtn for order direction USMO transport petitioner to Terminal Island
1982	
Jan 18	ENT (JLW) EVIDENTIARY HRG ON 2255 MTN: AUSA Marshall, deft cnsl Martin, deft present. Court hrs testimony. Def cnsl to file argument in memo form on 1-22-82; Govt to file response 1-27-82; JLW will prepare & submit a report & recommendation. deft Bagley waived right to be present at future proceedings.
Jan 18	121 EXHIBIT LIST
Jan 18	122 STIPULATION re testimony of John W. Lundin
Jan 22	123 MEMORANDUM def cnsl, in support of petitioner's claim
Jan 27	124 RESPONSE govt's, to petitioner's post-hrg memorandum
Feb 10	*Received 2255 mtn for deft (note deft filed 2255 mtn 10-21-80)
Feb 23	125 FINDINGS & RECOMMENDATIONS proposed for disposition of 2255 mtn
Feb 23	LODGED Order denying 2255 mtn
Mar 5	126 OBJECTIONS deft's, to proposed findings & recommendations for disposition
Mar 5	127 NOTICE deft'ss, of objections for 3-26-82
Mar 10	128 OBJECTIONS petitioner's to recommendation & findings
Mar 10	129 CERTIFICATE of service of objections
Mar 25	130 RESPONSE govt's, to petitioner's objections to findings & recommendations
Apr 23	131 REPORTER'S TRANSCRIPT proceedings before JLW, 1-18-82 (2255 mtn hrg)
May 12	132 ORDER (DSV) DENYING petitioner's mtn for 2255 cc: JLW, cnsl, petitioner
May 24	133 NOTICE deft's, of appeal
May 26	*Sent notice of appeal to Court of Appeals cc: AUSA, petitioner, Martin

***Feb 10	134 MOTION deft's, to vacate, set aside, or correct sentence (2255) NOTE; 2255 mtn was filed on Feb 10, 1982—not given new civil number at that time. cc: AUSA, DSV. *Civil No. C82-721V*
June 23	135 ORDER (PKS) for service & return of 2255 mtn cc: AUSA, deft
July 14	136 NOTICE deft's, of change of address: RR1, Box 177, Sioux City, Iowa 51108 cc:AUSA, DSV
July 26	137 ORDER (CCA) setting time schedule for appeal of 2255: desig of transcript due 8-2-82 applt's brief due 8-31-82 apple's brief due 10-1-82 **Per CCA desig of record due same time as transcript desig**
Aug 2	138 DESIGNATION deft cnsl, of reporter's transcript for appeal of 2255
Aug 3	*Sent certificate of record to Court of appeals for 2255 appl
Aug 13	139 ORDER (PKS) to show cause cc: Pet and AUSA
Aug 23	140 RESPONSE govt's, to order to show cause & mtn for late answer
Aug 24	141 ORDER (PKS) Granting respondents mtn to file a late answer—DUE 9-3-82 cc: petitioner & respondent
Sept 3	LODGED Mtn & Order for extension of time to file answer.
Sept 9	141 ORDER (PKS) for extension of time to file answer to 9-10-82
Sept 10	LODGED MOTION AND ORDER for extension of time within which to file an answer (Second Motion) Govt's
Sept 13	142 ORDER (PKS) extending time within which to file an answer to 9-24-82
Sept 16	143 TRANSCRIPTS CR's 1-20-78 Before DSV
Sept 24	144 ANSWER Govt's to Petitioners Motion Pursuant to 28 U.S.C. 2255
Oct 14	145 CERTIFICATE OF SERVICE

Oct 14	146	PETITIONER'S TRAVERSE to Governments late response
Oct 15	147	TRANSCRIPT CR *COPY* proceedings DSV 8-1-79
Oct 16	148	ORDER (CCA) Granting Applee Mtn for ext. of time to file brf. desg. & brf due 10-22-82 Reply due 11-8-82
Oct 20	149	REPORT AND RECOMMENDATION (PKS) RE: 28 USC 2255
Oct 20		LODGED Order Re: Deft. Mtn Pursuant to 28 USC 2255
Oct 22	150	DESIGNATION Appellee clerk's rec. on appeal.
Oct 27	151	DESIGNATION APPLNT Of clerk's record on appeal.
Nov 5	153	NOTICE OF MOTION Noting Deft. Object. to Magistrates Report & Recommendation for 11-26-82
Nov 5	154	OBJECTION Petitioner's to Magist. Report & Recommend.
Nov 17	155	ORDER (DSV) DENYING Pet. Rul 2255 Mtn. Apprved Mag. Report & Rec. C. Deft Ausa & Mag. FDP.
Nov 19	156	ORDER Extending time for appllant to file reply brief to 11/16/82
Dec. 6	157	NOTICE deft's of appeal *(C82-271V)*
Dec. 18		Sent Notice of Appeal, cc: docket, paymt notifctn form, cert. of record, informatn form. CC: notice and info. form to cnsl, deft. USMO, USPO. Docketing Statement to both parties.
Dec 29		*Sent record on appeal #C80-1044V (82-3303) TO CCA
DEC 29		*Sent record on appeal #C82-721V to CCA (83-3516)
Feb 9		**SUPPLEMENTAL RECORD TRANSCRIPT sent. 2-9-83. ON APPEAL.
Feb 14		***SUPPLEMENTAL RECORD ON APPEAL.
Feb 24		***TRANSCRIPTS from 1977.
March 2	158	LETTER from CCA Supplemental record on appeal consisting of reporter's transcript.

Apr 4	159	ORDER (CCA) From Conference atty. advising appellee's & appellant's brief's when to be filed also this order is subject to reconsideration by a judge if any objection is filed within 10 days of entry of this order.
Nov 26	160	ORDER (CCA) GRANTING an extension of time to and including 12-5-83 for appellee. (This order is subjeet to reconsideration if any opposition is filed within 10 days of the entry of this order.)
1984		
Mar 14	161	ORDER (CCA) Judgment of district court in this cause be and hereby reversed and remanded. cc: AUSA, DEFT CNSL, USPO, USMO, DIST JUDGE, DSV.
Mar 20	162	LETTER from Deft., asking the Judge to "re-issue the mandate and send a copy to his current address in order that he might perfect an appeal."
Mar 29	163	ENT (DSV) Status conference set for 4-5-84 at 2:00 p.m. Cnsl adv.
Apr 2	164	ENT (DSV) Status conf. STRICKEN for 4-5-84. New date to be set.
Apr 6	165	ENT (DSV) Status conference. Had. Govt. has mot to recall mandate pending b4 9th circuit Govt. has applied for permission to file Writ Of Cert. No trial date has been set Govt. to file mot re:cont. of trial.
Apr 20	166	MOTION Govt's for order excluding time under the speedy trial act noted for 5-4-84 w/attached Affidavit of David Marshall
Apr 20		***LODGED Order excluding time pursuant to the Speedy trial act.
Apr 24	167	ORDER (DSV) Excluding time pursuant to the speedy trial act. cc: AUSA, DEFT CNSL, USPO, USMO. (EOD 4-25-84).
Apr 30	168	MANDATE (CCA) Order recalling mandate and GRANTING stay of mandate. cc: AUSA, DEFT CNSL, USPO, USMO, US DIST JUDGE. (EOD 5-01-84).
July 16	169	MOTION and affidavit to proceed in forma pauperis.

July 16	170	MOTION 2255
Aug 3	171	ORDER (DSV) of REFERENCE to PKS cc: AUSA, PKS. EOD 8-3-84
Aug 10	172	ORDER (PKS) For service and return, 2255 mot. within twenty-one days after such service, the U.S. shall file and serve an answer thereto, in accordance w/Rule 5 of the Rules governing 2255 cases. cc: AUSA DEFT CNSL. DEFT.
Aug 23	173	RESPONSE Govt to deft's 2nd 2255 mtn (pv)
Sept 4	174	COVER LETTER From deft. advising of documents sent.
Sept 4	175	MOTION For appointment of cnsl.
Sept 4	176	CERTIFICATE OF service by mail.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR77 330 V

UNITED STATES OF AMERICA, PLAINTIFF,

v.

HUGHES ANDERSON BAGLEY, DEFENDANT.

DEFENDANT BAGLEY'S DISCOVERY MOTIONS AND MOTION FOR BILL OF PARTICULARS

Hughes Anderson Bagley, through his attorney John W. Lundin, hereby moves that the Court order the plaintiff, United States of America, to turn over the following material to him, pursuant to Federal Rule of Criminal Procedure 16, 12, 7(f) and the Court's inherent powers:

I
DISCOVERY MOTION

1. Notice of the Government's intention to use any evidence or the fruits thereof, which would be the subject of a Rule 12(b)(3) motion, i.e., a motion to suppress which must be raised prior to trial. It is moved that the notice specify with particularity, the evidence to be used.

2. Copies of written or recorded statements made by the defendant and the substance of oral statements made by the defendant which the government intends to use at trial, whether made before or after arrest, and recorded testimony of the defendant before a grand jury relating to the offenses charged.

3. A copy of defendant's prior criminal record, if any.

4. Copies of books, papers, documents, photographs, tangible objects which are material to the preparation of a

defense, or are intended for use by the government at trial, or belonging to or obtained from the defendant.

5. Copies of all examinations, scientific tests or experiments relating to the subject indictment, material to the preparation of the defense, or intended for use by the government at trial.

6. The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, and any deals, promises or inducements made to witnesses in exchange for their testimony.

7. The names and addresses and copies of recorded statements of all persons who have knowledge pertaining to the case, or who have been interviewed by federal agents in connection with the case, who the government does not intend to call as witnesses.

8. Notice of copies of any and all recorded conversations, including wiretaps, recordings, videotapes or any other similar mechanical, stenographic or electronic procedures utilized by the government in this case, whether or not the government intends to use them in evidence.

9. Copies of all Jencks Act material is requested at least ten (10) days prior to the date of trial.

10. Notice of and copies of any material documents, tangible objects, testimony, evidence or other material in the custody of the government or known to the government which is exculpatory to the defendant, which may be favorable to the defendant, or which would assist in the preparation of his defense, under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and subsequent cases. This would include, but not be limited to:

(a) Felony records of all persons the government intends to call as witnesses;

(b) Promises or representations made to any persons the government intends to call as witnesses at trial, including but not limited to promises of no prosecution, immunity, lesser sentence, etc.

(c) Names and addresses of persons spoken to by the government regarding the case, whether or not such persons are intended to be called by witnesses, who can either give favorable information regarding the defendant, or who

can testify to inconsistent statements made by government witnesses, or who can testify adversely to the government.

11. All information which would establish the reliability of the Milwaukee Railroad Employees in this case, whose testimony formed the basis for the search warrant.

The defendant moves that said material be delivered to his attorney by no later than December 5, 1977 so that it can be utilized in the preparation of this defense.

II
MOTION FOR BILL OF PARTICULARS

1. With respect to Count I of the indictment, state:

a. Whether defendant Bagley allegedly provided Landis Jared Emond with false identification and purchased a car for him *before* Emond was indicted on any charge.

b. Whether after allegedly providing Emond with false identification and purchasing a car, Emond returned after the indictment came down and entered a not-guilty plea to the court.

c. When defendant Bagley allegedly provided Emond with false identification and purchased a car for him and sold firearms to raise money for him, as is alleged in the indictment.

d. Whether money allegedly raised for Emond through the sale of firearms was ever given to Emond; if so, when and where.

e. What evidence is there to show that defendant Bagley knew that Emond committed certain offenses against the United States, as is charged in Count I of the indictment.

2. With respect to counts II and III of the indictment, state:

a. To whom the valium was distributed;

b. The quantities of valium allegedly distributed.

3. With respect to Count IV of the indictment, state:

a. What overt acts did defendant Bagley engage in which would indicate that he "engaged in the business of dealing in firearms and ammunition" without being so licensed to do so, as alleged in the indictment.

b. Whether defendant Bagley was arrested on a similar charge in 1970; the details of such arrest; and the disposition of the charges against him.

c. A list of any guns or ammunition allegedly possessed by defendant Bagley incident to the earlier arrest on similar charges, and an indication of which of those weapons are "antique" weapons, not subject to federal registration and licensing.

d. Copies of all published information made available to the public by the Department of Treasury providing guidance concerning elements of the offense of engaging in the business of selling firearms or ammunition without a license, or providing guidance regarding the ability to inidividuals to possess, acquire, or sell firearms without falling under federal regulations.

4. With respect to counts V and XV of the indictment, state:

a. Any actions or evidence showing that defendant Bagley "knowingly" possessed the material he allegedly possessed.

b. If the material was found pursuant to the execution of a search warrant, describe exactly where they were found and contained in defendant Bagley's residence.

5. With respect to counts VI through XV of the indictment, state:

a. What evidence or overt acts, if any, exist to show that defendant Bagley intended to distribute the material charged in the indictment.

b. If the material was found in defendant Bagley's residence pursuant to the execution of a search warrant, state precisely where this material was found and how it was packaged.

6. With respect to Count IV, state:

a. If firearms were found in defendant Bagley's house pursuant to the execution of a search warrant, and whether the government intends to introduce such firearms and ammunition as evidence against Mr. Bagley.

b. Describe what weapons and ammunition the government intends to introduce against Mr. Bagley, where they were found, and how they were packaged or wrapped.

DATED this 18th day of November, 1977.

/s/ John W. Lundin
JOHN W. LUNDIN
Attorney for Defendant Bagley

DEPARTMENT OF THE TREASU... BUREAU OF ALCOHOL, TOBACCO AND FIREA...

UNIQUE IDENTIFIER 490303772023?

CONTRACT
FOR PURCHASE OF INFORMATION AND PAYMENT OF LUMP SUM THEREFOR

It is agreed by and between the United States of America, and Jim O'Conner, designated herein as the vendor, that said vendor will furnish to the Regional Director, Bureau of Alcohol, Tobacco and Firearms, information concerning the following:

That he will provide information regarding T-I and other violations committed by Hughes A. Bagley, Jr.; that he will purchase evidence for ATF; that he will cut in an undercover capacity for ATF; that he will assist ATF in gathering of evidence and testify against the violator in federal court.

that upon the receipt of such information by the Regional Director, Bureau of Alcohol, Tobacco and Firearms, or his representative, and upon the accomplishment of the objective sought to be obtained by the use of such information to the satisfaction of said Regional Director, the United States will pay to said vendor a sum commensurate with services and information rendered; that the vendor will not divulge such information to any person other than the said Regional Director, or his authorized representative; that said vendor will not represent himself to be an employee of the United States of America; and that he has been advised that, if he is required by law to file an income tax return, the sum shown below should be included on the return as earned income.

Signed this 3rd day of May, 19 77, at Seattle, Washington, .

SUM TO BE PAID TO VENDOR $ 300 00

UNITED STATES OF AMERICA

James P. O'Connor
SIGNATURE OF VENDOR

Donnell C. Algh
SIGNATURE OF [illegible]

James P. O'Connor

APPROVAL RECOMMENDED (Signature)

SPECIAL AGENT	RESIDENT AGENT IN CHARGE	SPECIAL AGENT IN CHARGE
[signature]	Robert M Whitsell	Donnell C. Algh

After the information stated above has proven worthy of compensation, the special agent will prepare ATF Form 32, Payment to Vendor, which will contain the recommended amount to be paid and justification for the payment. This will include the results of the information, such as seizures, names of persons arrested. If an illicit distillery is seized, the daily producing capacity of the distillery will be included.

DESIGNATED AGENT

NAME	ADDRESS

PLAINTIFF'S EXHIBIT

ATF FORM 164-A (1-74) PREVIOUS EDITIONS ARE OBSOLETE

Department of the Treasury – Bureau of Alcohol, Tobacco and Firearms

PAYMENT TO VENDOR

TO: REGIONAL DIRECTOR
Bureau of Alcohol, Tobacco and Firearms
Seattle District Regional Office

INSTRUCTIONS: Special Agent will prepare in Original and 3 copies and submit with executed Forms 25 to the group supervisor/Resident Agent who will forward to the SAC who will forward all copies to the Regional Director. After approval and recommendation of amount the Regional Director will retain one copy. Return three copies to the SAC who will retain one copy and send one to Group Supervisor/Resident Agent and one copy to the Special Agent.

UNIQUE IDENTIFIER
4908 0377 2023 F

In connection with above numbered investigation, I request that a reward in the sum of $ 500.00 be paid to Donald Mitchell who resides at _____ for original information that resulted in the accomplishment listed below.

I have executed Form 25 – Application and Public Voucher for Reward of Original Information and attached them to this request.

Justification for payment of reward: (state the type and magnitude of the violation, names of persons arrested, seizures made, and other pertinent information which will substantiate and support the recommended reward.

This investigation covered a period of approximately three months from April through June 1977. Donald Mitchell actively assisted ATF, Seattle, Washington in making several undercover buys from Hughes A. Bagley, the violator. Bagley was engaged in the business of dealing firearms without a license, actively aiding and abetting a federal fugitive, and possessed controlled substances. Mitchell through his continual association with Bagley assisted ATF in obtaining probable cause to secure a search warrant which was subsequently served on Bagley's residence. Pursuant to the search warrant, 1 Anti-Tank Rifle Grenade (HEAT) was seized in addition to a silencer made into a rifle, various controlled substances and 29 T-I firearms.

In addition, he testified in Federal Court on December 12, 1977 in relation to the above circumstances.

On December 23, 1977, U. S. District Court Judge Donald Voorhees found Hughes A. Bagley guilty of two counts of narcotics violations, and eight counts of misdemeanor violations.

PLAINTIFF'S EXHIBIT 3

SPECIAL AGENT (Signature)	POST OF DUTY	DATE
	Seattle, Washington	12/21/77

RECOMMENDED APPROVAL BY	AMOUNT	DATE
GROUP SUPERVISOR/RESIDENT AGENT (Signature) Robert M. Winkell	500.00	1/3/78
SPECIAL AGENT IN CHARGE (Signature) Darnell C. Agl	300.00	1/3/78

REGIONAL DIRECTOR'S USE ONLY

APPROVED BY	AMOUNT	DATE
REGIONAL DIRECTOR (Signature)		
DATE FORM 25 FORWARDED TO FISCAL DIVISION:		

ATF Form 32 (3-73)

GPO 944-603

Department of the Treasury – Bureau of Alcohol, Tobacco and Firearms

PAYMENT TO VENDOR

TO: REGIONAL DIRECTOR
Bureau of Alcohol, Tobacco and Firearms
Seattle District Regional Office

INSTRUCTIONS: Special Agent will prepare in Original and 3 copies and submit with executed Forms 25 to the group supervisor/Resident Agent who will forward to the SAC who will forward all copies to the Regional Director. After approval and recommendation of amount the Regional Director will retain one copy. Return three copies to the SAC who will retain one copy and send one to Group Supervisor/Resident Agent and one copy to the Special Agent.

UNIQUE IDENTIFIER
4908 0377 2023 F

In connection with above numbered investigation, I request that a reward in the sum of $ 500.00 be paid to Jim O'Connor who resides at _____

for original information that resulted in the accomplishment listed below.

I have executed Form 25 – Application and Public Voucher for Reward of Original Information and attached them to this request.

Justification for payment of reward: (state the type and magnitude of the violation, names of persons arrested, seizures made, and other pertinent information which will substantiate and support the recommended reward.

This investigation covered a period of approximately three months from April through June 1977. Jim O'Connor actively assisted ATF, Seattle, Washington in making several undercover buys from Hughes A. Bagley, the violator. Bagley was engaged in the business of dealing firearms without a license, actively aiding and abetting a federal fugitive, and possessed controlled substances. O'Connor through his continual association with Bagley assisted ATF in obtaining probable cause to secure a search warrant which was subsequently served on Bagley's residence. Pursuant to the search warrant, 1 Anti-Tank Rifle Grenade (HEAT) was seized in addition to a silencer made into a rifle, various controlled substances and 29 T-I firearms.

In addition, he testified in Federal Court on December 12, 1977 in relation to the above circumstances.

On December 23, 1977, U. S. District Court Judge Donald Voorhees found Hughes A. Bagley guility of two counts of narcotics violations, and eight counts of misdemeanor violations.

PLAINTIFF'S EXHIBIT

SPECIAL AGENT (Signature)	POST OF DUTY	DATE
[signature]	Seattle, Washington	12/21/77

RECOMMENDED APPROVAL BY	AMOUNT	DATE
GROUP SUPERVISOR/RESIDENT AGENT (Signature) Robert M. Wendell	500.00	1/3/78
SPECIAL AGENT IN CHARGE (Signature) Darnell C. Alston	300.00	1/3/78

REGIONAL DIRECTOR'S USE ONLY

APPROVED BY	AMOUNT	DATE
REGIONAL DIRECTOR (Signature)		
DATE FORM 25 FORWARDED TO FISCAL DIVISION:		

ATF Form 32 (3-73)

GPO 844-803

DEPARTMENT OF THE TREASURY - BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

PAYMENT RECEIPT FOR INVESTIGATIVE EXPENSES INFORMATION AND/OR TREASURY CHECK

DATE RECEIVED	RECEIVED FROM (Name & Title)
[illegible]	[illegible] Special Agent

AMOUNT RECEIVED	AMOUNT RECEIVED
$ [illegible]	[illegible] AND [illegible]/100

METHOD OF PAYMENT
- [X] CASH
- [ ] CHECK
- [ ] MONEY ORDER

IF CHECK OR MONEY ORDER, SHOW NUMBER AND OTHER IDENTIFYING DATA

INVESTIGATIVE EXPENSES
- [ ] SUBSISTENCE
- [X] OPERATING EXPENSES
- [ ] MISC. EXPENSES

UNIQUE IDENTIFIER	RECEIVER'S SIGNATURE
[illegible]	[illegible]

ATF F 3220.1 (2-76) PREVIOUS EDITION WILL BE USED

[BEST AVAILABLE COPY]

PLAINTIFF'S EXHIBIT

DEPARTMENT OF THE TREASURY · BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

PAYMENT RECEIPT FOR INVESTIGATIVE EXPENSES INFORMATION AND/OR TREASURY CHECK

DATE RECEIVED	RECEIVED FROM (Name & Title)
1-4-78	[illegible]

AMOUNT RECEIVED	AMOUNT RECEIVED
$ [illegible]	[illegible] AND No/100

METHOD OF PAYMENT: [X] CASH [ ] CHECK [ ] MONEY ORDER

IF CHECK OR MONEY ORDER, SHOW NUMBER AND OTHER IDENTIFYING DATA

INVESTIGATIVE EXPENSES: [ ] SUBSISTENCE [X] OPERATING EXPENSES [ ] MISC. EXPENSES

Subvoucher No. Ey-78-14

UNIQUE IDENTIFIER	RECEIVER'S SIGNATURE
4[illegible]777423	[illegible] for L. E. Mitchell

ATF F 3220.1 (2-76) PREVIOUS EDITION WILL BE USED

[BEST AVAILABLE COPY]

PLAINTIFF'S EXHIBIT

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF WASHINGTON

October 29, 1981

Francis J. Diskin
Assistant United States Attorney
3600 Seafirst Fifth Avenue Plaza
800 Fifth Avenue
Seattle, WA 98104

RE: *Hughes Anderson Bagley, Jr., Petitioner* v. *Walter R. Lumpkin, Warden, Respondent.*
NO.: C80-1044V (CR77-330V)

Dear Mr. Diskin:

We request copies of the following documents for use in this case:

1. Copies of Chapters B (Sensitive Situations/Significant Investigations and Cases), D (Informant Development, Use and Control), and G (Rewards and Purchases of Information) from the Revision of ATF 0 3210.7A in effect in 1977. Please note that the Petitioner has received copies of these Chapters that became effective on 12-14-79.

2. Copies of any other ATF policies, guidelines or instructions involving the same or similar topics that were in effect during 1977.

3. Any evidence of instructions given to either James O'Connor or Donald E. Mitchell regarding their participation in the investigation of the Petitioner.

4. Copies of any statements made by O'Connor, Mitchell or any Government agent or attorney regarding reimbursements or payments of any kind to O'Connor, Mitchell or informants for participation in the investigation of Petitioner.

5. The ATF informant identification and control files for O'Connor and Mitchell.

6. To the extent that any of the following are not contained in the informant identification and control files for

O'Connor and Mitchell, copies of the following forms generated during the investigation of Petitioner:

A. SF 1012
B. SF 1129
C. SF 1166
D. SF 1195
E. ATF F 25
F. ATF F 32
G. ATF F 164-A
H. ATF F 3220.5
I. ATF F 3270.1
J. ATF 3220.1

Please note that if the documents received under requests 1 and 2 (above) contain material variations from the 1979 revisions in our possession, we reserve the right to seek additional discovery.

7. Unedited or uncensored copies of all the documents Petitioner received through his FOIA request, including but not limited to those attached to this discovery request.

8. Copies of any written agreements between either O'Connor or Mitchell and any government agent or attorney.

9. Any additional documents, not covered by the above request, that relates to the 1977 investigation of the Petitioner through O'Connor and Mitchell.

To the extent that any of the above discovery requests are duplicitive, one copy each of the requested documents will be sufficient.

Please let me know at the earliest possible date of any objections to the above discovery request.

Very truly yours,

Michael G. Martin
Assistant Federal Public Defender

CC: United States Magistrate John L. Weinberg
Hughes Anderson Bagley

Supreme Court of the United States

No. 84-48

UNITED STATES, PETITIONER,

v.

HUGHES ANDERSON BAGLEY

ORDER ALLOWING CERTIORARI. Filed *November 13, 1984.*

The petition for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-48

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether respondent's convictions should be set aside because the government failed to disclose, in response to respondent's pretrial request, evidence that respondent might have used to impeach two government witnesses, when it has been established beyond a reasonable doubt that the evidence would not have affected the verdict.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-48

UNITED STATES OF AMERICA, PETITIONER

v.

HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 719 F.2d 1462. The order of the district court (Pet. App. 7a-9a) and the proposed findings and recommendations of the magistrate (Pet. App. 10a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1983 (Pet. App. 17a). A petition for rehearing was denied on March 2, 1984 (Pet. App. 16a). On May 22, 1984, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to July 10, 1984. The petition was filed on that date and granted on November 13, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Respondent was indicted in the United States District Court for the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes.[1] In December 1977, after a trial without a jury, he was convicted on 11 counts of narcotics violations and acquitted on the other charges.[2] O'Connor and Mitchell, two private security guards who were also commissioned as state law enforcement officers, had aided the Bureau of Alcohol, Tobacco and Firearms (ATF) in its investigation of respondent and testified for the government at respondent's trial. Pet. App. 2a.

[1] Count I of the indictment charged that respondent was an accessory after the fact to various firearms offenses, in violation of 18 U.S.C. 3. Counts II and III charged that respondent distributed controlled substances, and Counts VI-XIV charged that he possessed controlled substances with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B). Count IV charged him with dealing in firearms and ammunition without being licensed to do so, in violation of 18 U.S.C. 922(a)(1) and 924(a). Counts V and XV charged him with possessing unregistered firearms, in violation of 26 U.S.C. 5861(d) and 5871. E.R. 1-7. ("E.R." refers to the Excerpt of Record filed in the court of appeals.)

[2] Respondent was found not guilty on Counts I, IV, V, and XV. He was convicted on Counts II and III. On Counts VI-XIV, he was found guilty "of the lesser-included crime of possessing the described controlled substance" (E.R. 31). On Count II he was sentenced to six months' imprisonment and a special parole term of five years. On Count III he was sentenced to a suspended term of three years' imprisonment and placed on probation for five years. On Counts VI through XIV his sentence was suspended and he was placed on probation for five years. E.R. 32. Respondent's probation was subsequently revoked when he was convicted of another offense, and he was sentenced to three years' imprisonment. Pet. App. 10a; E.R. 119.

Before the trial, respondent sought discovery of numerous items (J.A. 17-19). One of his discovery requests was for the following (J.A. 18):

> The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, any deals, promises or inducements made to witnesses in exchange for their testimony.

Among the material delivered in response to the various discovery motions were affidavits by O'Connor and Mitchell. These affidavits, which were apparently furnished by the government in order to comply with respondent's request (J.A. 18) for "all Jencks Act material" (see 18 U.S.C. 3500), had been prepared during the investigation of respondent. They recounted at some length the dealings that O'Connor and Mitchell had with respondent on various occasions. See E.R. 64-85.[3] Each affidavit contained the following recital: "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." E.R. 65, 66, 70, 72, 74, 77, 79, 82, 84.[4]

[3] Copies of these affidavits are also appended to respondent's motion for collateral relief, a copy of which we have lodged with the Clerk of this Court.

[4] The court of appeals characterized these recitals as statements by O'Connor and Mitchell that each "had neither received nor expected compensation for his services" (Pet. App. 2a). This description is exaggerated and inaccurate. The recitals, both literally and in context, represent only that the witnesses were not paid for giving their statements, not that they expected no compensation for the activities described in the statements.

2. In 1980, respondent filed a motion to vacate his sentence under 28 U.S.C. 2255.[5] He alleged that the government had failed to disclose evidence that he could have used to impeach O'Connor and Mitchell. Respondent's motion was assigned to the same district judge who had presided over his non-jury trial and rendered the verdict.

After a hearing before a magistrate, the district court found (see Pet. App. 7a) that in May 1977, O'Connor and Mitchell had each signed a blank form contract printed by ATF (see J.A. 22-23). This form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor."[6] The district court found that these forms "reflected no description of services, no dollar amount, and no signatures on behalf of ATF. The Contracts were not signed on behalf of ATF until after the trial" (Pet. App. 7a). O'Connor testified at the hearing on respondent's motion that he "signed many ATF forms during the course of the investigation" (*ibid.*), and the district court found that "neither O'Connor nor Mitchell remembers signing [the contracts]. * * *

[5] Respondent originally filed a petition for a writ of habeas corpus (see 28 U.S.C. 2241) in the Central District of California, where he was confined. This filing was deemed a motion for relief under 28 U.S.C. 2255 and transferred to the Western District of Washington. See E.R. 120. Apparently because respondent first sought a writ of habeas corpus, the warden having custody of respondent was named as the appellee in the court of appeals. The United States is the proper party adverse to the movant in a Section 2255 proceeding, and we have substituted the United States as petitioner in this Court.

[6] Respondent sought collateral relief after he had discovered these contracts by invoking the Freedom of Information Act and the Privacy Act, 5 U.S.C. 552 and 552a (Pet. App. 2a).

There is no evidence that either O'Connor or Mitchell read the Contract or retained a copy" (*ibid.*).

The district court further found that no representative of the government "ever promised future payment for their testimony, either to O'Connor or to Mitchell, except for nominal witness fees" (Pet. App. 11a). The court noted that the ATF agent with whom O'Connor and Mitchell were dealing "might have told them, at the time they signed the Contracts, that he would attempt to secure some expense money for them" (*id.* at 12a). After the trial, this ATF agent initiated efforts to obtain compensation for O'Connor and Mitchell, and each received $300 (*id.* at 13a, 14a; see J.A. 24, 25). On this basis, the district court concluded that "it appears probable * * * that O'Connor and Mitchell did expect to receive from the United States some kind of compensation, over and above their expenses, for their assistance, though perhaps not for their testimony" (Pet. App. 7a).[7]

The form contracts were not disclosed to respondent before trial. The government attorney responsible for prosecuting respondent stated, in stipulated testimony, that he had not known of the unexecuted contracts and that he would have furnished them to respondent if he had known of them (Pet. App. 13a).

3. The district court denied respondent's motion. It remarked that "[a]s the trier of fact in [respondent's] trial * * * this Court is in the unique position of being able to know what effect the disclosure of

[7] O'Connor and Mitchell also were paid a small amount of expense money—$90 and $80 respectively—before trial. The district court found that these payments "were intended to reimburse them" (Pet. App. 14a) for "various expenses, including but not limited to automobile use and meals in the course of the investigation" (*id.* at 13a).

the ATF agreements with O'Connor and Mitchell would have had upon the decisions made by the Court in the criminal prosecution" (Pet. App. 8a). The district court then ruled "beyond reasonable doubt that had the existence of the agreements been disclosed to [the court] during trial that disclosure would have had no effect at all upon its finding that the government had proved beyond a reasonable doubt that defendant was guilty of the offenses" of which he was convicted (*ibid.*).

The district court explained the basis for its ruling as follows (Pet. App. 8a):

> The Court has read in their entirety the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial * * *. Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The Court found the defendant not guilty of those charges. With respect to the charges against defendant of distributing controlled substances and possessing controlled substances with the intention of distributing them, the testimony of O'Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies which had been prescribed for defendant's own use. As to that aspect of their testimony, the testimony of O'Connor and Mitchell tended to be favorable to the defendant.

4. The court of appeals reversed (Pet. App. 1a-6a). It stated (*id.* at 5a-6a): "[W]e hold that the government's failure to provide [the] requested * * * information to [respondent] so that he could effectively cross-examine two important government witnesses requires an automatic reversal."

The court of appeals stated that respondent "was unaware during trial that O'Connor and Mitchell were subject to impeachment for bias based on their remunerative relationship with the government. The government's failure to disclose this * * * information inhibited [respondent's] ability effectively to cross-examine two important prosecution witnesses." Pet. App. 4a. The court of appeals then emphasized the importance of cross-examination (*id.* at 4a-5a) and justified its "automatic reversal" rule by asserting that "a failure [by the government] to disclose requested * * * information that the defendant could use to conduct an effective cross-examination is [particularly] egregious because it threatens the defendant's right to confront adverse witnesses, and therefore, his right to a fair trial" (*id.* at 5a).

SUMMARY OF ARGUMENT

A. The court of appeals' ruling—that the government's failure to disclose certain evidence that might have been used to impeach government witnesses warrants an "automatic reversal"—is clear and obvious error. This Court has repeatedly emphasized that a failure by the government to disclose information that the defendant might have used at trial does not warrant setting aside a conviction unless the evidence had some effect on the outcome of the trial. For example, even if the government knowingly uses perjured testimony to convict a defendant, the defendant is entitled to relief only if there is a reasonable likelihood that the false testimony affected the verdict. Indeed, in *Giglio* v. *United States*, 405 U.S.

150 (1972), the government not only failed to disclose evidence of the kind the court of appeals believed was involved here—"evidence affecting [the] credibility" of an important government witness—but elicited false testimony at trial to the effect that that evidence did not exist; nevertheless, this Court, specifically rejecting the approach that has now been adopted by the court below, stated: "We do not, however, automatically require a new trial * * *. A finding of materiality of the evidence is required" (*id.* at 154). This Court has reiterated the materiality requirement on numerous occasions, and no other court of appeals has adopted a rule of "automatic reversal" in cases of this kind.

B. While it is entirely clear that the court of appeals should not have overturned respondent's conviction without some showing of materiality, this Court has not defined the showing that is necessary in cases in which the government fails to make a complete response to a defendant's specific request for information—the category in which the court of appeals placed this case. We submit that it is unnecessary in that class of cases for the government to satisfy the strict "beyond a reasonable doubt" standard that the district court found to have been satisfied here. This Court has held that a standard functionally equivalent to the reasonable doubt standard is applicable to cases in which the prosecution has knowingly used perjured testimony. Such cases, however, raise special concerns and pose a singular threat to the administration of justice; cases involving only a failure to disclose evidence that might possibly be helpful to the defense are markedly different, and the standard of materiality applicable to such cases should not be collapsed into the strict standard used in perjury cases.

We submit that the standard of materiality applicable to cases in which the prosecution does not give a complete response to a specific defense request for evidence should be chosen from two standards previously established by the Court for determining whether a defendant is entitled to a new trial: the standard specified in *United States* v. *Agurs*, 427 U.S. 97 (1976), for assessing the materiality of evidence that the prosecution fails to produce in response to a general defense request; and the standard—somewhat more favorable to the defendant—used for determining whether nonconstitutional error requires a new trial. See *Kotteakos* v. *United States*, 328 U.S. 750 (1946). At least in cases like the present case, in which the "specific request" is of a boilerplate variety and does not call to the prosecutor's attention anything unusual or special that he might ordinarily overlook in complying with his general disclosure obligations, there is much to be said for applying the same standard that is used in cases involving general requests; in either situation, that standard provides satisfactory assurances that the accused has enjoyed a fair opportunity to present his defense. In at least some circumstances, however, a failure to disclose evidence in response to a specific request may mislead defense counsel and thereby impede effective presentation of his case. It may therefore not be unreasonable to allow a new trial in specific request cases when the defendant makes the lesser showing needed to satisfy the *Kotteakos* standard.

ARGUMENT

RESPONDENT'S CONVICTIONS SHOULD NOT HAVE BEEN SET ASIDE ON THE GROUND THAT THE GOVERNMENT FAILED TO DISCLOSE REQUESTED INFORMATION

A. The Prosecutor's Failure To Disclose Information To The Defense Does Not Warrant Setting Aside A Conviction Unless The Evidence Is Material

1. The court of appeals explicitly ruled that a conviction must "automatic[ally]" be set aside if the government, in response to a discovery request like respondent's, fails to disclose information that might have been useful in impeaching a government witness.[8] This ruling appears simply to ignore the teach-

[8] Certain passages in the court of appeals' opinion might be read to hold that respondent's convictions must be set aside only because the district court erred in concluding that the nondisclosure of the ATF form contracts was harmless beyond a reasonable doubt. See Pet. App. 4a, quoting *United States* v. *Goldberg*, 582 F.2d 483, 488-489 (9th Cir. 1978); Pet. App. 5a ("Here, the district judge, who presided over the bench trial, concluded beyond a reasonable doubt that disclosure of the ATF agreement would not have affected [respondent's] conviction. We disagree."). As we explain in Part B of this brief, we believe it would also be error to require the government to show that a nondisclosure of the kind involved in this case is harmless beyond a reasonable doubt. Consequently, even if this Court interprets the court of appeals' decision simply as a ruling that the government failed to prove beyond a reasonable doubt that the ATF contracts would not have affected the outcome of respondent's trial, the Court should still reverse the court of appeals' decision, both because that standard was indisputably satisfied here and because it is in any event too generous to respondent.

But it is fairly clear that the court of appeals applied not a standard of harmless beyond a reasonable doubt but a "standard" of—as the court itself explicitly said—"automatic reversal" (Pet. App. 6a). The passages in the court of appeals' opinion that mention a reasonable doubt standard appear to refer to the test that, in the court of appeals' view, should generally apply to "the government's failure to provide requested [exculpatory] information" (*id.* at 5a). After announcing this standard, however, the court of appeals ruled that when "the defendant could use" the information that was not disclosed "to conduct an effective cross-examination," the government's failure "is even more egregious" and accordingly "requires an automatic reversal" (*id.* at 5a-6a). It is unclear why the court of appeals believed that a failure to disclose information useful only for impeachment is more egregious than a failure to disclose directly exculpatory information, since just the opposite would normally be true. But that appears to be the court's ruling.

Not only does the opinion on its face reflect a requirement of automatic reversal, but it would have been extraordinary for the court of appeals to overturn the district judge's ruling about the effect of the evidence in question on the verdict—which was rendered by the district judge himself. At the very least, if the court of appeals did intend to overturn the trial judge's determination on this issue, one would have expected the court of appeals to provide a more full explanation of why the trial judge erred. Its failure to do so is a further indication that it indeed applied a rule of "automatic reversal."

ings of this Court's decisions. In a criminal prosecution, the government has a duty, under certain circumstances, to disclose information in its possession that could be useful to the defense. *United States* v. *Agurs*, 427 U.S. 97 (1976); *Brady* v. *Maryland*, 373 U.S. 83 (1963). But few things are better settled than that the prosecution's failure to disclose information does not require a new trial unless the information was material—that is, unless there is a sufficient likelihood, measured against the standard appropriate for the circumstances, that the evidence would have affected the outcome of the trial.

For example, even if the government deliberately uses perjured testimony in its efforts to convict a defendant—a far more egregious impropriety than anything alleged here (see *Agurs*, 427 U.S. at 104; *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935))—the conviction is not automatically set aside; the defendant is entitled to relief only if there is some reasonable "likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103 (footnote omitted). See *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959). In *Giglio*, the government not only failed to disclose evidence of the precise kind that the court of appeals believed was involved here—"evidence affecting [the] credibility" of a crucial government witness (405 U.S. at 154)—but actually elicited from the witness false testimony denying the existence of that evidence. Nevertheless, this Court explicitly stated: "We do not * * * automatically require a new trial" (*ibid.*). Instead, the Court ruled, "[a] finding of materiality of the evidence is required" (*ibid.*). Here, the government did not elicit false testimony from any witness (see page 3 note 4, *supra*); it therefore follows *a fortiori* from *Giglio* that a new trial was not automatically required here.[9]

This Court has repeatedly stated the principle that an automatic reversal is not warranted, and that some showing of materiality is required, in cases in which defendants seek to have their convictions set aside because the government failed to disclose, or

[9] In addition, of course, far from being "crucial" prosecution evidence on the counts on which respondent was convicted, the testimony of O'Connor and Mitchell was of little importance, and the judge who rendered the verdict stated that this testimony tended to be exculpatory.

otherwise suppressed, evidence that might have been helpful to the defense. In *Agurs*, where the prosecution did not disclose information in its files that was arguably useful to the defense, the Court viewed as axiomatic the principle that a defendant cannot obtain relief unless he shows that the evidence is material; the Court discussed only the degree of materiality that is required in various situations. See 427 U.S. at 104-114. See also *Moore* v. *Illinois*, 408 U.S. 786, 794-798 (1972); *Brady*, 373 U.S. at 87 (emphasis added) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process *where the evidence is material either to guilt or to punishment.*").

Recently, in *United States* v. *Valenzuela-Bernal*, 458 U.S. 858 (1982), the Court canvassed its precedents establishing that in all the various areas related to the government's obligation to disclose evidence useful to the defense, the defendant is not entitled to relief unless the evidence is material. See *id.* at 867-872, citing, inter alia, *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978); *United States* v. *Lovasco*, 431 U.S. 783 (1977); *Barker* v. *Wingo*, 407 U.S. 514 (1972); *United States* v. *Marion*, 404 U.S. 307 (1971); *Washington* v. *Texas*, 388 U.S. 14 (1967); and *Roviaro* v. *United States*, 353 U.S. 53 (1957). And in discussing the government's duty to preserve evidence, this Court has referred to the "standard of constitutional materiality" discussed in *Agurs* and stated: "Whatever duty the Constitution imposes * * *, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *California* v. *Trombetta*, No. 83-305 (June 11, 1984), slip op. 9 (footnote omitted). See also *United States* v. *Augen-*

blick, 393 U.S. 348, 356 (1969); *Giles* v. *Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring). The refusal to allow retrial in the absence of some showing of materiality of the claimed omission or error rests on the entirely sound principle that the interests of society and of criminal defendants as a class are ordinarily not furthered, but rather impaired, by burdening the criminal justice system with the obligation of retrying cases when there is no sufficient basis for doubting the accuracy of the outcome of the first trial.

2. In attempting to justify its rule of "automatic reversal," the court of appeals relied almost exclusively on *Davis* v. *Alaska*, 415 U.S. 308 (1974). But *Davis* is not a departure from the principle that the government's failure to disclose evidence cannot warrant a new trial unless there is a sufficient likelihood that the evidence would have affected the outcome of the initial trial. The Court in *Davis*, relying on the Confrontation Clause of the Sixth Amendment, overturned a conviction because the defendant was prohibited from using in his cross-examination of Green, a crucial witness against him, the fact that Green was on probation as a juvenile delinquent. The Court summarized the significance of this evidence (*id.* at 311):

> [Defense] counsel made it clear that he would not introduce Green's juvenile adjudication as a general impeachment of Green's character as a truthful person but, rather, to show specifically that at the same time Green was assisting the police in identifying [the defendant] he was on probation for burglary. From this [the defendant] would seek to show—or at least argue—that Green acted out of fear or concern of possible jeopardy to his probation. Not only might

> Green have made a hasty and faulty identification of [the defendant] to shift suspicion away from himself * * *, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation.

Elsewhere in the opinion in *Davis*, the Court described the evidence in a way that shows that the Court found the prohibition on its use highly damaging to the defense. See *id.* at 313-314, 318; *id.* at 319 ("Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry.").

On this basis, the Court in *Davis* concluded that defense counsel had to be able to "expose [Green's status] to the jury" in order "to make [his cross-examination] effective" (415 U.S. at 318). Because Green was a crucial witness, and the protective order prevented effective cross-examination, the Court equated *Davis* to *Brookhart* v. *Janis*, 384 U.S. 1 (1966), in which a defendant was denied the right to cross-examine witnesses at all, and to *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968), in which "the right of cross-examination" was "effectively * * * emasculate[d]" because the defendant was prohibited from making a "rudimentary inquiry at the threshold" into the name and address of the crucial witness against him. See *Davis*, 415 U.S. at 318.

The most prominent difference between *Davis* and this case is that *Davis* involved a direct restriction on the scope of cross-examination. Here, the district court did not limit the cross-examination of O'Connor and Mitchell in any way; respondent was free to inquire into their relationship with the government as vigorously as he wished. It is therefore at least ar-

guable that this case, unlike *Davis*, does not implicate the Confrontation Clause at all.

Assuming arguendo that *Davis* is relevant to the issue raised by this case, *Davis* can be said to stand at most for the proposition that when a defendant is denied the right effectively to cross-examine a crucial government witness, his conviction must be reversed. See *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 11. A requirement of materiality is obviously inherent in this principle: a conviction is to be set aside not if the cross-examination of any witness—or even a crucial witness—is in some way impaired [10] but only if the cross-examination of a key witness is inhibited to the point that it is rendered ineffective.[11] The district court in this case ruled that

[10] Indeed, the passage we quoted from *Davis* (pages 14-15, *supra*, quoting 415 U.S. at 311) suggests that the state court would not have erred if it had merely forbidden the use of Green's juvenile record "as a general impeachment of Green's character as a truthful person."

[11] See also *United States* v. *Abel*, No. 83-935 (Dec. 10, 1984), slip op. 4-5 (*Davis* requires only that a defendant "have some opportunity to show bias on the part of a prosecution witness"). The courts of appeals, in applying *Davis* to cases in which defendants challenged restrictions on cross-examination, have consistenly considered the materiality of the restrictions. In particular, the courts of appeals have denied relief where a defendant failed to show that the restrictions imposed on his right to cross-examine a government witness substantially interfered with cross-examination. See, *e.g.*, *United States* v. *De Gudino*, 722 F.2d 1351, 1354-1355 (7th Cir. 1983); *United States* v. *Arruda*, 715 F.2d 671, 680 (1st Cir. 1983); *United States* v. *Balliviero*, 708 F.2d 934, 938-940 (5th Cir. 1983); *United States* v. *Ong*, 541 F.2d 331, 341-342 (2d Cir. 1976); *United States* v. *Haimowitz*, 706 F.2d 1549, 1558-1559 (11th Cir. 1983); *United States* v. *Harley*, 682 F.2d 1018, 1021 (D.C. Cir. 1982). Indeed, even where substantial restrictions on cross-examination were erroneously imposed, several courts of appeals have denied relief if,

neither O'Connor nor Mitchell was a crucial witness against respondent in connection with the charges on which he was convicted, and that the nondisclosure of the ATF form contracts did not impair respondent's cross-examination of O'Connor and Mitchell to the extent that it could possibly be said that respondent was denied the right to effective cross-examination. Pet. App. 8a. The court of appeals did not explicitly disagree with either of these rulings or explain why either was wrong. Accordingly, *Davis* does not support the court of appeals' decision.

3. As we explain below, the courts of appeals disagree over the standard of materiality that should be applied in cases of this kind. See pages 23-24 note 16, *infra*. But there is no disagreement that some standard of materiality must be applied. We know of no other court of appeals that has adopted a rule of "automatic reversal" for the prosecution's failure to disclose information that would tend to impeach a government witness or for any other nondisclosure of information by the government.[12]

considering the evidence as a whole, the error was harmless. See, *e.g.*, *Carrillo* v. *Perkins*, 723 F.2d 1165, 1170-1172 & n.7 (5th Cir. 1984) (citing cases); *United States* v. *Whitt*, 718 F.2d 1494, 1501-1502 (10th Cir. 1983); *United States ex rel. Scarpelli* v. *George*, 687 F.2d 1012, 1013-1014 (7th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); *United States* v. *Gambler*, 662 F.2d 834, 840-842 (D.C. Cir. 1981); *Snyder* v. *Coiner*, 510 F.2d 224, 228 (4th Cir. 1975). In other cases, the courts of appeals have found certain restrictions on the right to cross-examination to be unconstitutional under *Davis*, but only after discussing the materiality of the restrictions. See, *e.g.*, *Chavis* v. *North Carolina*, 637 F.2d 213, 225-226 (4th Cir. 1980).

[12] There are numerous court of appeals cases in which the prosecution failed to disclose information useful for impeachment purposes in response to a specific request but the conviction was upheld because the evidence was not sufficiently

B. The Government Was Not Required To Demonstrate Beyond A Reasonable Doubt That The Undisclosed Evidence Would Not Have Affected The Verdict In Respondent's Trial

For the reasons we have stated, it is entirely clear that the court of appeals should have required some showing of materiality before setting aside respondent's convictions. It is not immediately clear, however, how material the undisclosed evidence had to be in order to justify such a result. This Court's previous decisions have not specified the standard of materiality that should be applied to a case in which the prosecution has failed to disclose evidence specifically requested by the defense—the category in which the court of appeals placed the case. See pages 21-22 and note 15, *infra*. Moreover, the courts of appeals have adopted differing approaches to cases of this kind. See pages 23-24 note 16, *infra*.

The district court stated that it was convinced beyond a reasonable doubt that the use of the ATF form contracts to impeach O'Connor and Mitchell would not have affected the outcome of respondent's trial. This "beyond a reasonable doubt" standard is

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material. See, *e.g.*, *United States* v. *Farid*, 733 F.2d 1318, 1320-1321 (8th Cir. 1984); *United States* v. *Sperling*, 726 F.2d 69, 72-73 (2d Cir. 1984); *Ruiz* v. *Cady*, 710 F.2d 1214 (7th Cir. 1983); *United States* v. *Truong Dinh Hung*, 667 F.2d 1105, 1107 (4th Cir. 1981), cert. denied, 454 U.S. 1144 (1982); *Zeigler* v. *Callahan*, 659 F.2d 254, 266-267 (1st Cir. 1981); *United States ex rel. Marzeno* v. *Gengler*, 574 F.2d 730 (3d Cir. 1978); *Calley* v. *Callaway*, 519 F.2d 184, 222 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976) ("[W]hen *Brady* is invoked to obtain information not favorable on the issue of guilt or innocence but useful for attacking the credibility of a prosecution witness, the information withheld must have a definite impact on the credibility of an important prosecution witness in order for the nondisclosure to require reversal.").

the strictest test of materiality, although still considerably short of requiring that a conviction be automatically set aside. While it was useful for the district court to note that this strict standard was met, we submit that the court need not have applied such a strict standard. For reasons we will explain below, we believe that the strictest materiality standard that can justifiably be applied to a case of this kind would be one comparable to the harmless error test used to determine whether a federal nonconstitutional error requires that a conviction be set aside. See *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946).

1. The opinion in *Agurs* contains this Court's most detailed discussion of the standards of materiality that are to be applied when the government fails to disclose exculpatory information to the defense. *Agurs* identified "three quite different situations * * * involv[ing] the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." 427 U.S. at 103.

a. In the first situation, "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." 427 U.S. at 103 (footnote omitted). Cases in this category include, for example, *Miller* v. *Pate*, 386 U.S. 1 (1967), in which the State had its witness testify that an article of clothing was stained with the victim's blood even though the prosecutor knew that the stain was paint.

In this category of cases, "the Court has applied a strict standard of materiality" (*Agurs*, 427 U.S. at 104). Specifically, the Court has ruled that the conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected

the judgment of the jury." *Id.* at 103 (footnote omitted). This standard—which is essentially indistinguishable from the standard of "harmless beyond a reasonable doubt" that is used for determining whether a federal constitutional error requires reversal of a conviction (see *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972); *Chapman* v. *California*, 386 U.S. 18, 23 (1967), citing *Fahy* v. *Connecticut*, 375 U.S. 85 (1963))—was applied by the district court in this case.

b. The second situation "is characterized by a pretrial request for specific evidence." 427 U.S. at 104. The Court in *Agurs* gave *Brady* v. *Maryland*, *supra*, as an example of a case in this category. In *Brady*, the defendant, charged with murder, requested the extrajudicial statements of his accomplice. The prosecution disclosed several such statements but did not disclose a statement in which the accomplice admitted that he, not the defendant, actually killed the decedent. This Court ruled that the suppression of the accomplice's confession violated due process.[13] See 427 U.S. at 104-106; 373 U.S. at 86-88. The court below appears to have concluded that the present case falls within this second category. We believe that conclusion is difficult to support,[14] but we will assume arguendo that it is correct.

[13] After ascertaining that under state law the confession would have been admissible in proceedings to determine the defendant's punishment but inadmissible on guilt or innocence, the Court ordered a new trial on the issue of punishment alone. 373 U.S. at 88-91.

[14] To begin with, it is questionable whether respondent's discovery request was comparable in specificity to that of the defendant in *Brady*. See, *e.g.*, *Zeigler* v. *Callahan*, 659 F.2d 254, 267 n.6 (1st Cir. 1981); *United States* v. *Goldberg*, 582 F.2d 483, 489 (9th Cir. 1978), cert. denied, 440 U.S. 973 (1979). But more important, it cannot really be said that the government failed to comply with respondent's discovery request. Indeed, the district court appears to have avoided a square ruling on whether the government should have disclosed additional information; it apparently preferred to rest its holding on the conclusion that respondent was not prejudiced even if the prosecution did err.

Respondent requested information concerning "any deals, promises or inducements made * * * in exchange for the[] testimony" of O'Connor and Mitchell (J.A. 18). The district court found that O'Connor and Mitchell were never promised payment by the government for their testimony (Pet. App. 7a, 11a), and the court of appeals did not set aside this finding—as indeed it had no basis to do. The form contracts were not filled out and were not signed by ATF until after the trial. Thus, at the time of respondent's discovery motion, the contracts did not show that the witnesses had been promised any money at all—much less compensation (as opposed to expense money) for their testimony (as opposed to their undercover law enforcement activity).

The district court found only that it was "probable" that O'Connor and Mitchell "did expect to receive * * * some kind of compensation" (Pet. App. 7a). Such a purely subjective and unilateral expectation, of course, did not have to be "disclosed" in response to respondent's pretrial request. Moreover, the district court stated that O'Connor and Mitchell expected compensation "for their assistance, though perhaps *not* for their testimony" (*ibid.*; emphasis added). Respondent's pretrial request referred only to consideration promised in exchange for testimony.

The district court attached no significance to the fact that O'Connor and Mitchell received a small amount of expense money before trial (see page 5 note 7, *supra*). It is unclear whether the court of appeals believed that the government should have disclosed this information. In any event, the reimbursement of expenses was not within respondent's discovery request.

The Court in *Agurs* did not define the standard of materiality that is to apply when the prosecution fails

the judgment of the jury." *Id.* at 103 (footnote omitted). This standard—which is essentially indistinguishable from the standard of "harmless beyond a reasonable doubt" that is used for determining whether a federal constitutional error requires reversal of a conviction (see *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972); *Chapman* v. *California*, 386 U.S. 18, 23 (1967), citing *Fahy* v. *Connecticut*, 375 U.S. 85 (1963))—was applied by the district court in this case.

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The Court in *Agurs* did not define the standard of materiality that is to apply when the prosecution fails

to disclose evidence that is within a specific discovery request filed by the defense. To be sure, the Court in *Agurs* did remark that a "fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial" (427 U.S. at 104), and some court of appeals decisions have viewed this as the standard of materiality to be applied in "specific request" cases. See pages 23-24 note 16, *infra*. But in our view this Court plainly did not intend the phrase "might have affected the outcome of the trial" to function as a standard or test at all, because that language provides no guidance on the crucial issue—how likely a judge must find it to be that the evidence would have affected the outcome of the initial trial before he orders a new trial.[15] In practice, the courts of appeals have applied differing standards for evaluating the materiality of

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[15] The Court in *Agurs* recognized the imprecision of the phrase "might have affected the outcome of the trial" when it rejected, for cases like *Agurs* itself, a standard that depended on whether the undisputed evidence "might" have affected the jury. See 427 U.S. at 109.

In our view, when the Court said that "materiality" involves "a concern that the suppressed evidence might have affected the outcome of the trial" it was merely providing a definition of materiality: evidence cannot be said to be "material" at all, under any test, unless it might have affected the outcome of the trial. The Court provided this definition, we believe, because *Brady* used the term "material" without explaining what it meant. See 373 U.S. at 87. The Court in *Agurs* wished to make it clear that materiality in the sense of affecting the outcome of the trial—and not prosecutorial misconduct—was at the core of the holding in *Brady*. See *Agurs*, 427 U.S. at 104 & n.10.

information that is not disclosed in response to a specific defense request.[16]

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[16] See, *e.g.*, *United States* v. *Flaherty*, 668 F.2d 566, 588 (1st Cir. 1981) (conviction not set aside because undisclosed evidence "had comparatively little significance, and we cannot say [that it] might have affected the outcome of the trial"); *United States* v. *DiCarlo*, 575 F.2d 952, 958, 959 & n.5 (1st Cir.), cert. denied, 439 U.S. 834 (1978) (standard of "demonstrably harmless error" applies in second *Agurs* category); *United States* v. *Sperling*, 726 F.2d 69, 72 (2d Cir. 1984) (equating materiality standard applied to first and second *Agurs* categories, but also intimating that "no reasonable likelihood" standard applies in second category only if the evidence was deliberately withheld by the government); *Chavis* v. *North Carolina*, 637 F.2d 213, 224, 225 n.16 (4th Cir. 1980) (convictions set aside because court found "no[] doubt that [the undisclosed evidence] * * * might have had a substantial impact on the outcome of the case"; stating that standard in "specific request" cases is stricter than in third *Agurs* category but intimating that it may be less strict than standard for knowing use of perjured testimony); *Monroe* v. *Blackburn*, 607 F.2d 148, 151 & n.5 (5th Cir. 1979) (when government does not make a response to a specific request, conviction will be set aside unless there is "no reasonable likelihood" that the evidence would have affected the outcome of the trial; this is "very similar" to test applied when prosecution knowingly uses perjured testimony); *Jones* v. *Jago*, 575 F.2d 1164, 1168-1169 (6th Cir.), cert. denied, 439 U.S. 843 (1978) ("We conceive under *Agurs* that the threshold of materiality is relatively low where a specific request is involved."); *United States* v. *Weidman*, 572 F.2d 1199, 1204-1205 (7th Cir. 1978) (this Court in *Agurs* "did not define the precise standard of materiality to be applied" to cases involving a specific request; no new trial ordered because undisclosed information "cannot be viewed as 'material' in any meaningful sense of the word"); *United States* v. *Farid*, 733 F.2d 1318, 1320-1321 (8th Cir. 1984) (suggesting that standards for second and *third Agurs* categories are the same; upholding district court's "determin[ation] that the undisclosed material would not have made a difference"); *United States* v. *Gold-*

c. The third situation identified in *Agurs* occurs when the defendant has made either no request or "merely a general request for exculpatory matter" (427 U.S. at 107). In such a situation, a convicted defendant is entitled to a new trial only if there was evidence in the prosecution's files that, when "evaluated in the context of the entire record," creates "a reasonable doubt that did not otherwise exist" about the defendant's guilt (*id.* at 112).

Strickland v. *Washington*, No. 82-1554 (May 14, 1984), sheds further light on the test *Agurs* establishes for this category of "general request" cases. The Court ruled in *Strickland* that a similar test applies when a defendant attempts to obtain a new trial on the ground that, owing to the incompetence of counsel, certain evidence was not introduced at his first trial. See slip op. 24-25. The Court explained that, in order to satisfy this test, "[t]he defendant

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berg, 582 F.2d 483, 488-489 & n.7 (9th Cir. 1978), cert. denied, 440 U.S. 973 (1979) (standard is "whether the requested evidence might affect the outcome of the trial," which is "synonymous with the harmless error standard," citing both Fed. R. Crim. P. 52(a) and *Chapman* v. *California*, 386 U.S. 18, 24 (1967), without distinguishing between them; also asserting that there is a "readily applicable distinction" between the materiality standard applied in "specific request" cases and the standard applied to the knowing use of perjured testimony); *United States* v. *Warhop*, 732 F.2d 775, 778 (10th Cir. 1984) (standard is whether there is "a reasonable possibility" that the evidence might have affected the outcome of the trial; citing both *Chavis* v. *North Carolina*, *supra*, and *United States* v. *Goldberg*, *supra*); *United States* v. *Montoya*, 716 F.2d 1340, 1346 (10th Cir. 1983), quoting *United States* v. *Prout*, 526 F.2d 380, 389 (5th Cir.), cert. denied, 429 U.S. 840 (1976) ("[T]o be material, impeachment evidence suppressed must at least affect a 'witness whose testimony is crucial to the government's case.'").

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Slip op. 24. Since the Court apparently intended the *Strickland* standard closely to resemble the standard specified in *Agurs* for "general request" cases, the *Strickland* formulation of this standard can be viewed as an accurate account of the meaning of the *Agurs* "general request" standard as well.

2. A strong argument can be made that the standard of materiality specified in *Strickland* and for the third category of cases considered in *Agurs* should be applicable to "specific request" cases as well. While we do not believe that this conclusion is necessarily compelled, we outline the argument in support of it because it helps demonstrate the inappropriateness of applying a "beyond a reasonable doubt" standard when the prosecution fails to respond fully to a specific request.

a. The materiality standard that should apply to a "specific request" case must be designed to protect the constitutional interests that are threatened when the prosecution does not disclose information in response to a specific request. The most important interest is obvious: it is to ensure that the accused has a fair chance to present evidence that tends to show his innocence. As Justice Marshall explained in *Agurs* (427 U.S. at 116; dissenting opinion):

> Our overriding concern in cases such as the one before us is the defendant's right to a fair trial. One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tend-

ing to show guilt, be fully aired before the jury * * *.

But this interest is fully protected by the standard of materiality applicable to cases in the third category described in *Agurs* and to claims of ineffective assistance of counsel. This is because the interest in having "evidence tending to show innocence * * * fully aired" is equally impaired irrespective of the reason that the evidence was not aired: it does not matter whether the evidence is not revealed because the defense does not request it of the prosecution (or makes only a general request); because the prosecution does not respond to a specific request; or because the prosecution does not possess the evidence and defense counsel incompetently fails to discover it. In each instance the evidence is omitted, and the resulting threat to the reliability of the trial process is equally great.[17]

The Court has determined that the materiality standard adopted in *Agurs* for "general request" cases and further elucidated in *Strickland* is sufficient to protect the interest in a fair and reliable trial process in those contexts. It follows that the same standard, if applied in "specific request" cases, should be sufficient to ensure that "the proper func-

[17] Indeed, the threat is also equally great when it is the fault of neither the prosecution nor defense counsel that the evidence did not come to light. In such a case, the defendant must seek relief under Fed. R. Crim. P. 33 and must "satisfy the severe burden of demonstrating that [the] newly discovered evidence probably would have resulted in an acquittal" (*Agurs*, 427 U.S. at 111; footnote omitted). The Court explained, in both *Agurs* and *Strickland*, the interests that led it to adopt in those cases a standard of materiality that is less favorable to the government. See *Agurs*, 427 U.S. at 111; *Strickland*, slip op. 23-24.

tioning of the adversarial process" is not "so undermined * * * that the trial cannot be relied on as having produced a just result" (*Strickland*, slip op. 16).

b. Consequently, a more strict standard of materiality should apply to "specific request" cases only if additional interests are implicated in such cases that are not affected when a prosecutor receives only a general request. It is not immediately apparent, however, what those interests are. Some courts of appeals have justified their imposition of a stricter standard of materiality in "specific request" cases by relying on this Court's discussion in *Agurs* of "the function of the request" (427 U.S. at 106).[18] The Court stated that a specific request gives the prosecutor "notice of exactly what the defense desire[s]." *Ibid.* Consequently, the Court reasoned, "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Ibid.* By contrast, a general request alerts the prosecutor only to his obligation to disclose "obviously exculpatory" material that he would have been obligated to disclose even in the absence of a request. *Id.* at 106-107.

We question whether the Court intended this discussion of the difference between general request and specific request cases to serve as the basis for applying different standards of materiality. To begin with, this discussion concerns "the pretrial decision of the prosecutor" whether to disclose evidence; the Court

[18] See, *e.g.*, *United States* v. *Oxman*, 740 F.2d 1298, 1306-1319 (3d Cir. 1984), petition for cert. pending *sub nom. United States* v. *Pflaumer*, No. 84-1033 (filed Dec. 27, 1984), discussed at page 35 note 22, *infra*; *United States* v. *Imbruglia*, 617 F.2d 1, 4-5 (1st Cir. 1980); *United States* v. *Goldberg*, 582 F.2d 483, 488 (9th Cir. 1978), cert. denied, 440 U.S. 973 (1979).

in *Agurs* carefully pointed out that there is "a significant practical difference" between this decision and "the post-trial decision of the judge" (427 U.S. at 108). The issue in this case is the standard of materiality that applies to the latter.

Moreover, this Court's discussion necessitates a very rigorous definition of what constitutes a "specific" request—a definition that would clearly exclude respondent's request in this case. See generally *Brown* v. *Chaney*, No. 84-169 (Dec. 10, 1984), slip op. 7 (Burger, C.J., dissenting from the denial of certiorari). When defense counsel requests certain evidence because he is seeking support for a theory of the defense that is not predictable or obvious, the request may indeed alert the prosecution to the defendant's interest in a particular category of information in its files. But more often—as in this case—a defendant's discovery requests will be routine, almost boilerplate demands for material that almost every defendant will want to receive; they will in fact give the prosecutor no more notice of what the defense seeks than he would have had if he had received a general request for all helpful material. A prosecutor will know, whether or not he receives a request, that the defendant is likely to be interested in receiving material that might be used to impeach government witnesses; and he will know that "any deals, promises or inducements made" to such witnesses "in exchange for their testimony" (J.A. 18) fall into that category. Thus, in this case and in other cases in which the defense makes a routine request for broad categories of information, the prosecutor's receipt of the request does not necessarily make his failure to disclose certain material any less excusable than it would have been in the absence of a request.

In addition, while we agree that it is not good practice for a prosecutor deliberately to withhold a document that contains material information, falls within a defense request, and has been specifically brought to his attention, that is not what happened here. As the district court found, the prosecutor in this case did not know of the ATF form contracts and would have disclosed them if he had. More important, it would be misleading to regard deliberate, considered concealment as the typical example of a government failure to disclose specifically requested information. A criminal investigation can involve numerous law enforcement agents associated with several diverse agencies. Moreover, a defendant or a witness might have had previous unrelated (or only indirectly related) encounters with law enforcement agencies. In such instances, documents that are arguably evidence of, for example, "deals, inducements, and promises" between the government and a witness can be scattered among numerous files in many different government agencies. A single prosecutor, no matter how relentless in attempting to fulfill a defense request for evidence, may have difficulty uncovering all the documents that fall within it. A failure to disclose evidence in response to a specific request is, therefore, often the result of nothing more "inexcusable" than the unavoidable difficulties of operating a large bureaucracy.[19] Under *Agurs*, the post-trial discovery

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[19] In this case, the documents in issue were apparently not in the files of the United States Attorney's office (compare *Giglio* v. *United States*, *supra*) but in the possession of law enforcement agencies involved in the investigation. In our view, a defense request for information should not ordinarily be construed as applying to unspecified law enforcement agencies that were not involved in the investigation—and should

of the evidence in such cases entitles a defendant to a relief if it raises a reasonable doubt about his guilt; but the fact that such cases involve a specific request is little reason to apply a more strict standard of materiality.

Finally, even to the extent that the failure to respond to a specific request *is* less excusable than the failure to respond to a general request or to no request, it does not follow that the standard of materiality should be stricter in a case involving a specific request. As the Court emphasized in *Agurs*, the fact that a prosecutor's actions may have been inexcusable does not mean that it should be easier for the defendant to obtain a new trial:

> Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. * * * If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

427 U.S. at 110; footnote omitted. As the Court said in *Brady*, a case that *Agurs* characterized as involving a specific request for information: "'[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of*

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certainly not be interpreted as applying to other government agencies that do not regularly engage in the investigation of criminal offenses. See generally *United States* v. *Beasley*, 576 F.2d 626, 630-631 (5th Cir. 1978); *United States* v. *Weidman*, 572 F.2d 1199, 1205-1207 (7th Cir. 1978); *United States* v. *Haldeman*, 559 F.2d 31, 73-74 (D.C. Cir. 1976) (en banc), cert. denied, 431 U.S. 933 (1977); *United States* v. *Dansker*, 537 F.2d 40, 61 (3d Cir. 1976).

the prosecution. The principle * * * is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.'" *Agurs*, 427 U.S. at 110 n.17, quoting and adding emphasis to *Brady*, 373 U.S. at 87. See also *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 14 n.31.

c. Notwithstanding the strength of the argument that cases involving a specific request should be subject only to the "reasonable probability" standard of *Strickland* and the general request cases, we acknowledge that a materiality standard more favorable to the defendant might reasonably be adopted in specific request cases. An incomplete response to a specific request not only deprives the defendant of certain evidence but has the effect of representing to the defendant that that evidence does not exist. The defendant may, as a result, abandon certain defenses or certain lines of inquiry that he would otherwise have pursued. It may then be difficult for a defendant, in post-trial proceedings, to reconstruct the course that his defense and the trial would have taken and to demonstrate that he would have created a reasonable doubt about his guilt. This can happen even if, as in this case, the incomplete response is given in complete good faith and without any intention of misleading the defense. In view of the possible unfairness of prosecutorial actions that have the effect—even if unintended—of misleading the defense, and of the need to encourage prosecutors to take steps to avoid such possible unfairness, a somewhat stricter standard of materiality may be deemed appropriate in "specific request" cases.

Here again, however, it is important not to overstate the differences between a situation in which there has been a specific request and one in which there has been no request or only a general request.

A defendant may be unaware of—and therefore unable to request—evidence in the prosecution's files that would cause him to pursue a different approach to the case. In attempting to demonstrate the materiality of that evidence under the standard applicable to the third *Agurs* category, the defendant will be faced with similar difficulties of reconstructing the course that his strategy and the trial would have followed. Similarly, a defendant whose trial counsel has made incompetent decisions must prove prejudice in order to obtain relief under *Strickland*, and in doing so he will face the difficult task of reconstructing the course that his defense would have followed if he had had competent counsel. See generally *Engle* v. *Isaac*, 456 U.S. 107, 133-134 (1982). Accordingly, although there are some differences between "specific request" and "general request" cases, the similarities between those two categories are sufficiently great to make a "beyond a reasonable doubt" standard of materiality—the strictest standard—clearly inappropriate in "specific request" cases.

3. The reasonable doubt standard would be inappropriate in "specific request" cases for two additional reasons. First, "harmless beyond a reasonable doubt" is the standard applied when a constitutional error has been committed; the nondisclosure of requested information is not in itself constitutional error. Second, a failure to respond fully to a discovery request does not implicate the vital interests that are threatened when the prosecution knowingly uses perjured testimony. The strict "beyond a reasonable doubt" standard applicable to the first category of cases identified in *Agurs* therefore has no place in this case.

a. The Constitution contains no clause requiring the prosecution to disclose exculpatory information

in its files—either on its own motion or in response to a request. Cf. *United States* v. *Augenblick*, 393 U.S. 348, 356 (1969).[20] The constitutional requirement of disclosure is derived entirely from the Due Process Clause. See *Agurs*, 427 U.S. at 102, 107; *Brady*, 373 U.S. at 87. And the Due Process Clause does not somehow contain a latent set of discovery rules; it requires certain kinds of pretrial disclosure not as an end in itself, but only as a means to the end of securing a fair trial. "The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry* v. *Johnson*, No. 83-328 (June 11, 1984), slip op. 6 (footnote omitted).

It follows that a prosecutor's failure to disclose information does not violate the Constitution unless it results in a denial of the fundamental fairness that the Due Process Clause requires. See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (1974) ("When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's [actions] * * * so infected the trial with unfairness as to make the resulting conviction a denial of due process."). As the Court emphasized in *Agurs*, "unless the [failure to disclose information] deprive[s] the defendant of a fair trial, there [is] no constitutional violation requiring that the verdict be

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[20] We do not understand the court of appeals to have relied on any nonconstitutional sources of authority, such as the supervisory power or Fed. R. Crim. P. 16, in setting aside respondent's convictions. Nor do we believe such free-form use of the supervisory power would be proper. See, *e.g.*, *United States* v. *Payner*, 447 U.S. 727 (1980).

set aside; and absent a constitutional violation, there [is] no breach of the prosecutor's constitutional duty to disclose. * * * [T]o reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 427 U.S. at 108.[21] And of course the prosecution's failure to disclose an item of requested information does not necessarily make a trial unfair. "[T]here can be no such thing as an error-free, perfect trial, and * * * the Constitution does not guarantee such a trial." *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983). The nondisclosure of requested information, therefore, is not ipso facto constitutional error and accordingly should not trigger the application of the constitutional harmless error rule. Cf. *Agurs*, 427 U.S. at 111-112. It should give rise only to an inquiry into whether the trial, taken as a whole, was nonetheless fair.

This Court has, in the exercise of its supervisory powers, sometimes imposed duties on the federal government to respond to requests for information from criminal defendants in certain strictly limited circumstances. See, *e.g.*, *Jencks* v. *United States*, 353 U.S. 657 (1977); *Gordon* v. *United States*, 344 U.S. 414 (1953). Congress has imposed a somewhat similar statutory duty. 18 U.S.C. 3500. It has never been suggested that these duties are constitutionally mandated (see, *e.g.*, *Augenblick*, 393 U.S. at 356; *Palermo* v. *United States*, 360 U.S. 343, 345 (1959)),

[21] While the Court made these remarks in *Agurs* in connection with "general request" cases, the source of any constitutional duty to disclose information remains the Due Process Clause, irrespective of whether the request is general or specific, and the same analysis applies.

and if the government violated these duties it would not have to demonstrate that the error was harmless beyond a reasonable doubt. See, *e.g.*, *Rosenberg* v. *United States*, 360 U.S. 367, 371 (1959); *id.* at 377 (Brennan, J., dissenting) (citing *Kotteakos* v. *United States*, *supra*). By contrast, neither the Court nor Congress has explicitly imposed on federal prosecutors a general duty to respond to all discovery requests for material information. See *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977). It follows *a fortiori* that the failure to make such responses should not be subjected to a standard that requires proof of harmlessness beyond a reasonable doubt.[22]

[22] In *United States* v. *Oxman*, 740 F.2d 1298, 1306-1319 (3d Cir. 1984), petition for cert. pending *sub nom. United States* v. *Pflaumer*, No. 84-1033 (filed Dec. 27, 1984), the court of appeals ruled that the government violates the Constitution whenever it fails to deliver requested evidence to the defense, so long as the defendant has a substantial basis for claiming that the evidence is material. The court further ruled that such a "violation" requires the reversal of the defendant's conviction unless it is harmless beyond a reasonable doubt. As we explain in our petition in *Pflaumer*, this holding is erroneous in several respects. First, it misinterprets the Due Process Clause by viewing it as prescribing rules to govern prosecutors' conduct; in fact, under the decisions of this Court discussed in text, the Due Process Clause is concerned not with the prosecutor's actions but with the fairness of the resulting trial. Second, as we demonstrated above (pages 10-17, *supra*), a defendant, in order to gain relief on the ground that the government failed to disclose or preserve evidence, must demonstrate that the evidence was in fact material, in the context of the actual trial; there is no warrant for lowering the threshold, as the court of appeals in *Pflaumer* did, to a "substantial basis" for "claiming" materiality. Cf. *Cuyler* v. *Sullivan*, 446 U.S. 335, 348-350 (1980). Third, as we explain in text, the "beyond a reasonable doubt" standard is appropriate for cases involving constitutional

b. The knowing use of perjured testimony threatens extremely important interests; a materiality standard equivalent to the constitutional harmless error rule is an appropriate means of protecting those interests. But a prosecutor's failure to comply with a specific discovery request is in no way comparable to the knowing use of perjured testimony, and the standard for assessing the latter should not be collapsed into the standard for remedying the former.

There is a fundamental difference between refusing to disclose information to the defense and presenting false evidence to the judge and jury. It is well settled that the adversary system permits the government to withhold evidence to some degree. See, *e.g.*, *Weatherford*, 429 U.S. at 559-561. Some elements of secrecy and surprise are necessarily part of the adversary system, and they are not necessarily undesirable. But it is an equally fundamental principle of the adversary system that neither side may knowingly present false evidence to the court. Reasonable persons can differ over the extent to which withholding of information potentially helpful to the defense may be countenanced in an adversary system; there is no room for disagreement over whether the government may knowingly present false testimony. "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction" is "implicit in any concept of ordered liberty" (*Napue*, 360 U.S. at 269). As the Court explained in the seminal case dealing with the knowing use of perjured testimony (*Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935)):

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error or the knowing use of perjured testimony but not for cases in which the government has simply failed to comply fully with a specific defense request for information.

> [D]ue process * * * cannot be deemed to be satisfied * * * if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

It is for this reason that the result of a trial in which the government knowingly used perjured testimony will not be allowed to stand unless the government can show, beyond a reasonable doubt, that the perjury was immaterial. As the Court stated in *Agurs*, "[i]n th[e]se cases, the Court has applied a strict standard of materiality * * * mo[st] importantly because they involve a corruption of the truth-seeking function of the trial process." 427 U.S. at 104. Such a strict standard serves several important interests. It maintains public confidence in " '[t]he untainted administration of justice' " (*Mesarosh* v. *United States*, 352 U.S. 1, 14 (1956) (citation omitted)). " 'The administration of justice must not only be above reproach, it must be above the suspicion of reproach.' " *People* v. *Savvides*, 1 N.Y. 2d 554, 556, 136 N.E.2d 853, 854, 154 N.Y.S. 2d 885, 887 (1956), quoted in *Kyle* v. *United States*, 297 F.2d 507, 514 (2d Cir. 1961); see *Napue*, 360 U.S. at 269-170. As one commentator has stated:

> Perjury or the possibility of perjury strikes at the heart of the judicial system in its role as finder of truth. When the prosecutor involves himself in perjury he lends official sanction to

> the fraud. * * * The court must combat this threat to its own dignity and to the dignity of the criminal system or risk the possibility that the community will lose faith in the entire criminal process. Thus [a strict standard of materiality] provide[s] protection for the court and the legal system as well as for the defendant.

Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 138 (1964). The strict standard of materiality also helps deter prosecutors from using false testimony by making it clear that their tactics, if discovered, will not bring them any advantage.

This case does not raise concerns remotely comparable to those of the cases involving the knowing use of perjured testimony. The obligation to respond to a request for impeaching information cannot be said to be fundamental to the concept of ordered liberty. A trial process in which the government does not fully respond to such requests could not be characterized as a "pretense" or a "contrivance." Nor can it possibly be said that public confidence in the criminal process depends on the belief that incomplete responses to such requests will not be countenanced in the way that it undoubtedly does depend on the perception that a "frame-up" of a defendant by the use of perjured testimony will not be tolerated. The application of a "beyond a reasonable doubt" standard to circumstances like those presented here would, therefore, be an unnecessary incursion on the finality of convictions obtained after a fair trial.

4. In sum, "specific request" cases warrant, at most, the application of a standard of materiality somewhat more generous to the defendant than the "reasonable probability" test of *Strickland* and the

third *Agurs* category, but well short of the "beyond a reasonable doubt" standard applied by the district court below. Abstractly speaking, the standard should be more strict than the "reasonable probability" standard to a degree precisely commensurate with the additional interests that are arguably implicated when the government fails to respond to a specific disclosure request; as we have noted, these interests are not very weighty.

In order to avoid the further proliferation of verbal formulations, however, the Court may wish to adopt for this purpose a well-recognized standard that falls between the "reasonable probability" and "beyond a reasonable doubt" standards—specifically, the test for harmless error applied to nonconstitutional cases. This standard was stated most fully in *Kotteakos*, 328 U.S. at 764-765:[23]

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand * * *. But if one cannot say, with fair assurance, after pondering all that happened * * * that the judgment was not substantially swayed by the error, it is impossible to conclude that [the error was harmless]. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether

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[23] The *Kotteakos* harmless error standard is, of course, distinct from the standard of harmless beyond a reasonable doubt that is applied in determining whether constitutional error requires that a conviction be set aside. See, *e.g.*, *Connecticut* v. *Johnson*, 460 U.S. 73, 88 n.2 (1983) (Stevens, J., concurring in the judgment); 3A C. Wright, *Federal Practice and Procedure* § 856 at 335 (1982).

> the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Needless to say, in applying this standard great deference should be given to the trial judge's determination, since he is in the best position by far to assess the impact that particular items of additional evidence would have had on the trial. See *Agurs*, 427 U.S. at 113-114. Moreover, it should ordinarily be difficult for a defendant to satisfy this standard when —as in this case—only evidence that tends to impeach a prosecution witness, and not directly exculpatory evidence, is at issue. Cf. *United States* v. *Anderson*, 574 F.2d 1347, 1354 (5th Cir. 1978).

The *Kotteakos* standard is applied after a finding of error for the purpose of determining whether the error was of sufficient gravity that it may have impaired the fairness of the trial. The situation for which the *Kotteakos* was designed is thus analytically distinct from the present class of cases, for nondisclosure of evidence that a defendant might have elected to introduce at trial is not in itself error—it is simply a possible reason to question the overall fairness of the trial. See pages 32-35, *supra*; *Agurs*, 427 U.S. at 111-112. Moreover, the *Kotteakos* standard is, in our view, more strict than is necessary to provide full protection to the rights of an accused in "specific request" cases, in view of the close resemblance between such cases and "general request" cases. But if the Court concludes that a reduced showing of materiality should be required for specific request cases, the *Kotteakos* standard is a familiar one, and it seems to us to reflect a reasonable if not ideal balance of interests. As this Court has recently noted, the purpose of harmless error rules like the

Kotteakos standard is to ensure "the essential fairness of the trial." *McDonough Power Equipment, Inc.* v. *Greenwood*, No. 82-958 (Jan. 18, 1984), slip op. 5. Since, as we have explained, the ultimate question in assessing the significance of the government's failure to respond to a request for evidence is whether the trial was essentially fair, the *Kotteakos* standard embodies the kind of inquiry reasonably well suited to the task.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

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No. 84-48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, *Petitioner*,

v.

HUGHES ANDERSON BAGLEY, *Respondent*.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

Whether the government's non-disclosure of material, impeaching information concerning the bias of two key witnesses, and subsequent misleading response to respondent's specific pretrial discovery request violated respondent's constitutional right to a fair trial as secured through his Sixth Amendment right to assistance of counsel and effective cross-examination?

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I

RELEVANT CONSTITUTIONAL PROVISIONS

Amendment Five to the United States Constitution:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

Amendment Six to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him, and to have the assistance of counsel for his defense.

II

STATEMENT OF THE CASE

A federal grand jury indicted respondent Hughes Anderson Bagley in the Western District of Washington, alleging fifteen violations of federal firearms and narcotics statutes.[1] Respondent's trial counsel filed a detailed pre-trial discovery motion (J.A. 17-19), requesting, among other things,

> The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, any deals, promises or inducements made to witnesses in exchange for their testimony.

In partial response to the discovery request the government provided affidavits (E.R. 64-85), by two government

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[1] The charges are accurately recounted in Petitioner's Brief at p.2, n.1.

witnesses, O'Connor and Mitchell.[2] The affidavits were a response to respondent's specific request for evidence of any "deals, promises or inducements made to witnesses in exchange for their testimony." Each affidavit, after recounting the dealings the two witnesses had with respondent on various occasions, closes with the statement: "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." E.R. 65, 66, 70, 72, 74, 77, 79, 82, 84.[3]

Respondent waived jury,[4] was convicted on 11 counts of narcotics violations in December, 1977, and was acquitted on the remaining charges.[5]

While in custody serving his sentence, respondent filed requests for information pursuant to the Freedom of

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[2] We agree with the government's characterization of O'Connor and Mitchell at p.2 of Petitioner's Brief.

[3] The Petitioner claims that the court of appeals' characterization of these recitals, as statements that O'Connor and Mitchell "has neither received nor expected compensation for his services," is both exaggerated and inaccurate. Petitioner's Brief at p.3. n.4. The petitioner believes the statements "represent only that the witnesses were not paid for giving their statements. . . ." Id. The petitioner is attempting to minimize the impact of the statements upon the respondent and his trial counsel. When viewed in context, with respondent and trial counsel believing in good faith that the government had made full disclosure in response to their discovery request, the statements are materially false representations which mislead respondent and defense counsel.

[4] Respondent has filed a motion under 28 U.S.C. § 2255 alleging the government's failure to disclose the existence of the contracts caused him to waive his right to trial by jury when he would not have done so if he had known that the contracts existed.

[5] See Petitioner's Brief at p.2, n.2 for specifics regarding the convictions and acquittals.

Information Act and the Privacy Act, 5 U.S.C. §§ 552 and 552(a).[6] In response to his requests, respondent received edited copies of what appeared to be contracts signed by O'Connor and Mitchell in May, 1977, seven months prior to trial, promising the two payment for providing information about respondent to the Bureau of Alcohol Tobacco and Firearms (BATF), for acting as agents for BATF, for purchasing evidence for BATF, and for testifying against respondent. (J.A. 22-23). Based on the existence of these contracts and what respondent believed to be clear violations of his discovery request, respondent filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255.[7]The motion was assigned to the same district judge who had heard respondent's trial and convicted respondent.

Following a hearing conducted before a magistrate, the district court made several findings in denying respondent's motion. (Pet. App. 7A). The district court found that on or about May 3, 1977 O'Connor and Mitchell each signed a blank contract form entitled "Contract for Purchase of Information and Payment of Lump Sum Therefore". (J.A. 22-23) The printed language on each form "provided that the individual signing it would provide information to ATF; and that, "upon the accomplishment of the objective sought to be obtained by the use of such information," the United States will pay, "a sum commensurate with services and information rendered. . . ." Pet. App. 11A-12A. BATF agent Norm Prins,[8] the govern-

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[6] See Petitioner's App. 2A.

[7] See Petitioner's Brief at p.4, n.5 for the specifics regarding respondent's motion.

[8] Agent Prins presented the contracts to O'Connor and Mitchell for their signatures in May, 1977. At that time he had been a BATF agent for approximately five years. Although Assistant United States Attorney Francis J. Diskin was not aware of the existence of the contracts, Prins undoubtedly was aware of their existence and their relevance to the defense case.

ment's case agent and the person responsible for supervising O'Connor and Mitchell, "might have told them that he would attempt to secure some expense money for them." Id. at 12A. O'Connor and Mitchell received some expense money prior to trial. (Pet. Brief at p.5, n.7). After trial, Agent Prins arranged for O'Connor and Mitchell to receive $300 each pursuant to the terms of the contract. (Pet. App. at 13A-14A). (J.A. at 24-25). The district court then concluded that "it appears probable . . . that O'Connor and Mitchell did expect to receive from the United States some kind of compensation, over and above their expenses, for their assistance, though perhaps not for their testimony." Pet. App. at 7A.

The contracts signed by O'Connor and Mitchell in May, 1977, were not disclosed to respondent prior to trial. Assistant United States Attorney Francis J. Diskin, responsible for prosecuting respondent, stated in stipulated testimony that he had not known that the contracts existed and that he would have furnished them to respondent had he known of them. (Pet. App. at 13A).

The district court denied respondent's 2255 motion stating that because the court had been the trier of fact, it was able to determine what effect the contracts would have had upon the court's decision to convict respondent. (Pet. App. at 8A). The court ruled that beyond a reasonable doubt the contracts would have had no effect upon the convictions, (ibid.) explaining its ruling as follows:

> The Court has read in their entirety the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial . . . . Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The Court found the defendant not guilty of those charges. With respect the charges against the defendant of distributing controlled substances and possessing controlled substances with the intention of distributing them, the testimony of O'Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies which had been prescribed for defendant's own use. As to that aspect of their testimony, the testimony of O'Connor and Mitchell tended to be favorable to the defendant.[9]

The Ninth Circuit Court of Appeals reversed the district court's order (Pet. App. 1A-6A), stating that "the government's failure to provide [the] requested . . . information to [respondent] so that he could effectively cross-examine two important government witnesses requires an automatic reversal." Pet. App. at 5A-6A. The court stated that "the government's failure [alone] to produce requested *Brady* [v. Maryland] information is a serious due process violation," id. at 4A, that is "seldom, if ever, excusable." Ibid. The court then justified the automatic reversal stating that "failure to disclose requested *Brady* information that the defendant is even more egregious because it threatens the defendant's right to confront

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[9] The district court's rationale is flawed. Although the testimony of O'Connor and Mitchell may have been brief, it certainly was not favorable to respondent as it was the only testimony presented that was relevant to the drug charges on which the respondent was convicted. The court's statement that respondent did not attempt to discredit the two witness' testimony as to the facts of distribution is noteworthy. The government not only withheld evidence that could be used to discredit the testimony, but also submitted false statements which led respondent to believe that the testimony could not be discredited. Respondent had no reason to believe the testimony could be discredited.

adverse witness, and therefore, his right to a fair trial." Id. at 5A.

III

SUMMARY OF ARGUMENT

The court of appeals correctly found that the government's failure to disclose requested information concerning the paid status of its key and only witnesses against the defendant constituted material, constitutional error requiring reversal of his convictions. The peculiar facts of this case amply support the conclusions of the court of appeals. This Court formulated the basic principle that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution". *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). Nondisclosure in such situations is "seldom, if ever, excusable". *United States* v. *Agurs*, 427 U.S. 97, 106 (1976). These failures are seldom excusable because they almost invariably implicate the defendant's right to a fair trial as protected by the Fifth and Sixth Amendments. *Giglio* v. *United States*, 405 U.S. 150, 154-55 (1972); *Napue* v. *Illinois*, 360 U.S. 264 (1959). Where the government's failure to comply with its duty to disclose interferes with and materially affects a constitutional right of the defendant, reversal of a conviction is mandated. *Giglio* v. *United States*, *supra*; *Strickland* v. *Washington*, 466 U.S. ___, No. 82-1554 (May 14, 1984); *Davis* v. *Alaska*, 415 U.S. 308 (1974).

Applying the above principles to this case, the court of appeals held that the government's failure to disclose requested information resulted in a denial of respondent's right to effectively cross-examine the only witness

against him concerning their motive to provide false information based upon their status as paid informers. Such interference with the right to cross-examine critical government witnesses is "error of the first magnitude and no amount of showing of want of prejudice would cure it". *Davis*, 415 U.S. at 318, citing *Brookhart* v. *Janis*, 384 U.S. 1, 3 (1966); *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968).

Despite the government's attempt to minimize the constitutional implications of its failing in this case, the court of appeals correctly found that constitutional error occurred and that the error required reversal. *Chapman* v. *California*, 386 U.S. 18, 23 (1967); *Giglio* v. *United States*, *supra*; *Napue* v. *Illinois*, *supra*. Rather than analyzing the record, the government here relies upon the dicta of the court of appeals, indicating that this case requires "automatic reversal," to justify its argument that there was no consideration given to the materiality of the government's misconduct in reaching the decision to reverse the defendant's convictions. As will be demonstrated below, the government's argument rests on a false premise. For this reason, the considerable effort spent by the government in its Opening Brief in an attempt to cast this case in non-constitutional terms is largely irrelevant.

IV

ARGUMENT

A. The Duty To Disclose

Both the district court and the court of appeals recognized that the government in this case failed to discharge its duty to disclose to the defendant, after request, information to which he had a right to discover. The government bears an institutional responsibility to provide to the defendant requested information which is exculpatory

in nature. *Brady* v. *Maryland*, 373 U.S. 83 (1963). Similarly, the government is obliged to disclose any and all consideration which it has held out to a witness or which the witness subjectively hopes for or anticipates since such consideration directly gives rise to the inference of bias or interest. *See generally, United States* v. *Mayer*, 556 F.2d 245, 248-49 (5th Cir. 1977) (cross-examination of a prosecution witness who has had prior dealings with the prosecution or other law enforcement officials "ought to be given the largest possible scope"; conviction reversed). More specifically, the prosecution is obliged to disclose sources of bias, motive or interest, such as potential financial reward or remuneration. *Wheeler* v. *United States*, 351 F.2d 946 (1st Cir. 1965); *United States* v. *McCrane*, 547 F.2d 204 (3rd Cir. 1976). This duty of disclosure was analyzed by this Court in *Giglio* v. *United States*, 405 U.S. 150 (1972). In *Giglio*, a key government witness testified that he was promised no consideration from the government in return for his testimony. In fact, a prosecuting attorney who was not responsible for the trial told the witness that, in return for his testimony, he would not be prosecuted. This communication was apparently unknown to the government's trial attorney. The Court reasoned:

> In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the non-disclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.

405 U.S. at 154.

The Court recognized that the witness, Taliento, provided key information for the government. Taliento's

credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know it. 405 U.S. at 154-55. Applying the test set down in *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959) the Court required a new trial because there existed a reasonable likelihood that the jury's verdict could have been affected.

The basic principle drawn from these cases is that the government is obliged to disclose pertinent, material evidence favorable to the defense, and this applies not only to matters of substance, but to matters relating to the credibility of government witnesses. *Giglio* v. *United States*, *supra; United States* v. *Gerard*, 491 F.2d 1300 (9th Cir. 1974).

B. Applicable Standard For Review

As a predicate to further discussion it is necessary to establish the standard for review of this case and to determine whether the court of appeals properly applied that standard. In *United States* v. *Agurs*, 427 U.S. 97 (1976), the Court established a framework for reviewing all cases involving non-disclosure of exculpatory or impeaching evidence by the prosecutor. *Agurs* distinguished three different situations involving "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense". 427 U.S. at 103. In each category a reviewing court is required to determine whether the undisclosed evidence was material. Each category contains its own criteria for determining when evidence is material and when it has reached a prescribed threshhold of significance requiring remand for a new trial. The threshhold differs for each situation.

The first category involves situations where a constitutional error has been committed. (See Petitioner's Brief at p.32). In this type of case materiality is present if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, at p.103. The second category involves situations where the defendant has made a pretrial request for specific, non-privileged evidence in the prosecutor's possession. If the prosecutor fails to produce such evidence, a subsequent conviction will be set aside if "the suppressed evidence might have effected the outcome of the trial," 427 U.S. at 104. Non-disclosure in this situation is "seldom, if ever, excusable", 427 U.S. at 106. Third, when defense counsel makes either a general request for exculpatory evidence or no request at all, any duty to disclose must derive from the obviously exculpatory character of evidence in the prosecutor's possession. A conviction will be set aside for non-disclosure only if the omitted evidence, evaluated in the context of the entire record, "creates a reasonable doubt that did not otherwise exist. . . ." 427 U.S. at 112.

Both the district court and the court of appeals categorized this case within the first level discussed above; that is, a non-disclosure involving constitutional error. We submit that this was the appropriate categorization. In *Agurs*, this Court identified the knowing and uncorrected use of perjured testimony as the type of case which would result in constitutional error if there was any reasonable likelihood that the false testimony could have affected the judgment of the jury. The Court relied upon its prior decisions in *Giglio* v. *United States*, *supra; Alcorta* v. *Texas*, 355 U.S. 28, 31 (1957) and *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (per curiam). In cases fitting within the first category defined by *Agurs*, the test applied is the harmless constitutional error test set forth in *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

The uncorrected use of perjured testimony is a particularly egregious form of non-disclosure. A new trial in such situations will follow almost universally. This is so "not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." *United States* v. *Agurs*, 427 U.S. at 104. Materiality inheres in such situations. Indeed, it is difficult to imagine a situation involving the use of undisclosed and perjured testimony which would not result in reversal. However, the use of perjured testimony is not the only type of case involving the first category of non-disclosure discussed in *Agurs*. We submit, and the government apparently agrees (Pet. Brief at p.32) that non-disclosures resulting in constitutional error must all be analyzed under the harmless constitutional error standard. It is precisely this principle which resulted in the court of appeals decision in this case:

> Standing alone, the government's failure to produce requested *Brady* information is a serious due process violation. *Hibler*, 463 F.2d at 459. In fact, this failure is 'seldom, if ever, excusable.' *United States* v. *Agurs*, (citation omitted). But a failure to disclose requested *Brady* information that the defendant could use to conduct an effective cross-examination is even more egregious because it threatens the defendant's right to confront adverse witnesses, and therefore, his right to a fair trial. (citation omitted)

719 F.2d at 1464

The court of appeals rested this conclusion on this Court's decision in *Davis* v. *Alaska*, 415 U.S. 308 (1974). *Davis* involved inappropriate restrictions on the defendant's right to cross-examine a critical witness testifying against him. The trial court refused to allow defense counsel to cross-examine the witness concerning his sta-

tus as a juvenile probationer. The Court found that the limitations imposed by the trial court impermissibly interfered with the defendant's Sixth Amendment right to confront his accusers. It is precisely that right which was jeopardized in this case. In *United States* v. *Agurs*, *supra*, the Court reasoned that "if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U.S. at 110. Thus, when analyzing the materiality of errors occurring through the non-disclosure of relevant evidence to a defendant, the courts are directed to focus on the nature of the evidence withheld in relation to the specific constitutional right offended. The following discussion focuses on the character of the evidence withheld and its effect upon specific constitutional rights of the respondent.

C. The Nature Of The Constitutional Error In This Case

1. The Sixth Amendment Guarantees The Right To The Effective Assistance Of Counsel

A review of this Court's decisions demonstrates the firmly established principle that the Sixth Amendment right to counsel "is a fundamental component of our crimi nal justice system." *United States* v. *Cronic*, 466 U.S. ___, No. 82-660 (May 14, 1984).[10] The right to counsel is one that forms the bulwark for the invocation of all other rights:

> Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail' as this Court has recognized repeatedly. 'Of the rights that an accused person has, the right to be represented by counsel is by far the most precious, for it affects his ability to assert any other right he may have.'

Id. (footnotes omitted).

Nearly fifty years ago this Court recognized a defendant's need for the assistance of counsel in *Powell* v. *Alabama*, 287 U.S. 44 (1938).[11] More recently, this Court found that defense counsel is just as much a necessity as a prosecutor is in criminal proceedings. *Gideon* v. *Wainright*, 372 U.S. 335 (1963). The question that follows concerns the level of "Assistance" that is required by defense counsel.

> 'It has long been recognized that the right to counsel is the right to the effective assistance of counsel.' *McMann* v. *Richardson*, 397 U.S. 759, 771, n.4 (1970). The text of the Sixth Amendment itself suggests as much. The amendment requires not merely the provision of counsel to the accused, but 'Assistance,' which is to be 'for his defence.' Thus, 'the core purpose of the counsel guarantees was to assure 'Assistance' at trial, when the accused was confronted with both the intracacies of the law and the advocacy of the prosecutor.' *United States* v. *Ash*, 413 U.S. 300, 309 (1973).

United States v. *Cronic*, 466 U.S. at ___.

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[10] See also, *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *In Rae Gault*, 387 U.S. 1, (1976); *Douglas* v. *California*, 372 U.S. 353 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Powell* v. *Alabama*, 287 U.S. 45 (1932).

[11] In *Powell*, the Court found that the nine Scottsboro boys, charged with capital rape, had been denied a fair trial in violation of the Due Process Clause, based on counsel's performance at trial. Respondent's right to a fair trial under the Due Process Clause is discussed in Section C3, infra.

The Sixth Amendment, then, guarantees not only the "Assistance" of counsel, but also the "effective assistance of counsel."

2. The Right To The Effective Assistance Of Counsel Is Inextricably Intertwined With The Right To Confront The Witnesses Against The Respondent And The Right To Cross-Examine Those Witnesses With The Assistance Of Counsel

The Sixth Amendment right guaranteeing an accused "to be confronted with the witnesses against him" means more than simple physical confrontation. *Davis* v. *Alaska*, 415 U.S. at 315. There the Court quoted *Douglas* v. *Alabama*, 380 U.S. 415, 418: "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." The Court went on to quote Professor Wigmore's Treatise on Evidence,[12] finding that:

> Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harrassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing,

[12] "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions in obtaining immediate answers. 5 J. Wigmore Evidence, § 1395, p.123 (3rd Ed. 1940)."

> the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trail, and is 'always relevant as discrediting the witness and effecting the weight of his testimony.' 3A J. Wigmore, Evidence § 940, p.775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Greene* v. *McElroy*, 360 U.S. 474, 496 (1959).

Davis v. *Alaska*, 415 U.S. at 316-17.

Cross-examination is a means by which a seasoned trail lawyer can attack what would otherwise appear to be an air-tight case. "Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and argument would have stood up against rebuttal and cross-examination by a shrewd, well prepared lawyer." *Strickland* v. *Washington*, 466 U.S. at ____. (Marshall, J., dissenting).

A defendant's right to confront his accusers and to cross-examine them cannot be separated from the right to the effective assistance of counsel. Denial of any of these rights erodes the public's confidence in the criminal justice system and deprives a defendant of his right to a fair trial.

3. The Fifth Amendment Right To Due Process Guarantees The Right To A Fair Trial

This Court has found

> [t]hat the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trail. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment. . . .

Strickland v. *Washington*, 466 U.S. at ____.

A fair trial is "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Id.[13] This adversarial process works properly only when both sides have equal access to the tools needed to establish the facts and, ultimately, the truth. Without equal access to the tools, the adversary system stumbles, undermining the integrity of the truth finding process and the reliability of the verdict.

4. The Government's Failure To Disclose The Contracts Signed By O'Connor And Mitchell Denied Respondent The Right To A Fair Trial, The Right To Confront His Accusers, And The Right To The Effective Assistance Of Counsel

The government had in its possession contracts signed by O'Connor and Mitchell approximately seven months prior to trial. On its face, each contract gave O'Connor and Mitchell at the very least, the expectation of receiving payment or reward for services rendered. The fact that

[13] The adversarial process has been emphasized by this Court repeatedly in recent years. See footnote 10, *supra*, and cases cited therein.

the contracts, when signed, did not promise a specific amount to each witness does not render the contracts impotent. Rather, it makes the respondent's need to cross-examine O'Connor and Mitchell regarding the contracts that much greater, for the witnesses had the incentive to perform beyond expectation in order to maximize their profits. The reality of this human flaw was recognized in *Boone* v. *Paderick*, 541 F.2d 447, 451 (4th Cir. 1976). There the court reasoned that "the more uncertain the agreement the greater the incentive to make the testimony pleasing to the promisor." See also, *Campbell* v. *Reed*, 594 F.2d 4, 7-8 (4th Cir. 1979). Therefore, it is all the more important to allow full cross-examination in such cases to explore both the motives for falsification and the possible impact of future expectations upon the quality of the testimony being offered.

The government would lead the court to believe that because the prosecutor was not aware that the contracts existed, the government should not suffer adverse consequences due to the nondisclosure.

> Nor is the effect of non-disclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officers other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. 'The cruelest lies are often told in silence.' If the

> police silence as to the existence of the reports resulted from negligence rather than guile, the deception is no less damaging.

Barbee v. *Warden*, 331 F.2d 842, 846 (4th Cir. 1964) (footnotes omitted).

The government must accept full responsibility for the failure to disclose the contracts, especially in light of respondent's specific discovery request for such evidence.

This failure was magnified by the government's disclosure, immediately prior to trial, of statements by O'Connor and Mitchell[14] indicating that they had not been paid, would not be paid, and did not expect to be paid for their undercover work. These statements effectively coaxed respondent and trial counsel into believing that the testimony of O'Connor and Mitchell was not subject to attack.[15]

The withholding, whether deliberate or negligent, prevented trial counsel from confronting O'Connor and Mitchell with evidence of their motive to testify and from thoroughly cross-examining them regarding the contracts. Without the contracts in hand to prepare for cross-examination of the witness, trial counsel's representation was, through no fault of his own, less than effective. For example, we can assume that the decision to waive the right to a jury trial was impacted by the government's false representation that it possessed no impeaching

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[14] The Court should note that some of these statements were signed by O'Connor and Mitchell on the same day as that on which the contracts were signed.

[15] The obvious attack on credibility would focus on the witness' motive to please the government by maximizing the effect of their assistance, i.e., by assuring a conviction, in expectation of maximizing their profits. See *Campbell* v. *Reed*, 594 F.2d 4, 7-8 (4th Cir. 1979).

information concerning O'Connor and Mitchell. Respondent's Sixth Amendment rights were violated, due soley to governmental interference.[16]

The adversarial process broke down due to the governmental interference. The district court was not presented with material evidence and argument by counsel as to the effect of the evidence, depriving respondent of a fair trial.

> [T]his Court and other courts have been . . . nearly unanimous in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witness against him is a denial of the . . . guarantee of due process of law.

Pointer v. *Texas*, 380 U.S. 400, 405 (1965).

The adversarial process having broken down in this case, "the process loses its character as a confrontation between adversaries, [and] the constitutional guarantee is violated. *United States* v. *Cronic*, 466 U.S. at ____.

The above discussion clearly indicates that substantial constitutional rights of the respondent were violated as a result of the non-disclosures in this case. The following discussion focuses on the "character of the evidence" withheld. The critical importance of the withheld evidence

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[16] "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." "*Strickland* v. *Washington*, 466 U.S. at ____. Here the government interfered by affecting respondent's right to trial by jury, right to confront his accusers, right to cross-examination, right to the effective assistance of counsel, and right to a trial comporting with the due process of the law.

demonstrates that the court of appeals was correct in finding that the government's nonfeasance required reversal.

D. The Materiality Of The Non-Disclosure

As the above argument indicates, the non-disclosures interfered with the defendant's constitutional right to a fair trial as secured by the Fifth Amendment and Sixth Amendment right to effectively confront his accusers. Because this case involves federal constitutional error, it cannot be held to be harmless unless this Court is able to declare that there exists no reasonable likelihood that the error affected the outcome of the trial. *United States* v. *Agurs*, *supra*, at p.103. In light of the facts of this case, the court of appeals determined that a retrial was necessary. Retrial was ordered after review of the entire trial court record. The court stated that the magnitude of the error requires "an automatic reversal". *Bagley*, 719 F.2d at 1464. Within the context of the decision, the "automatic reversal" language is dicta. Yet, it is the "automatic reversal" language which forms basis for the petitioner's argument that the issue of materiality was not addressed by the court of appeals. However, a reading of the entire content of the opinion quite clearly indicates otherwise. In fact, the government concedes that the opinion "might be read to hold that respondent's convictions must be set aside only because the district court erred in concluding that the non-disclosure of the ATF form contracts was harmless beyond a reasonable doubt". Pet. Brief, at p.10, n.8. In the same note the government properly states that the court relied upon its prior decision in *United States* v. *Goldberg*, 582 F.2d 483 (9th Cir. 1978) in analyzing and deciding the issue at bar. In *Goldberg* the court of appeals found that:

> Since under the due process clause prosecutorial failure to respond to a specific request 'is seldom, if ever, excusable,' . . . such a non-disclosure is properly anaylzed as error; and it therefore follows that the reviewing judge should apply the harmless error standard, . . . [T]he *Chapman* standard of 'harmless beyond a reasonable doubt' requires a new trial whenever there is a 'reasonable possibility' that the error materially affected the verdict. (citations omitted). (footnote omitted).

582 F.2d at 488-89

The court then goes on to briefly discuss the facts in this case which it believed required reversal. In arguing that the court failed to consider materiality, the petitioner complains that "at the very least, if the court of appeals did intend to overturn the trial judge's determination on this issue, one would have expected the court of appeals to provide a more full explanation of why the trial judge erred". Pet. Brief at p.11, n.8. Appropriately, the petitioner cites no authority for the proposition that a court of appeals is required to provide a lengthy dissertation as to why an instance of prosecutorial misconduct requires reversal. There is no such requirement. The petitioner's real complaint is the superfluous use of the phrase "automatic reversal". While that phrase distracts the petitioner, it does not support its theory that the court failed to consider the issue of materiality at all.

In determining that this case involved material constitutional error, the court cited to *Davis* v. *Alaska*, *supra*. The teachings of *Davis* were appropriately relied upon by the appellate court. This case involved more than mere non-disclosure. The affidavits of the government witnesses contained the recital that "I made this statement freely and voluntarily without any threats or rewards or

promises of reward having been made to me in return for it". E.R. 65, 66, 70, 72, 74, 77, 79, 82, 84. This statement was provided in response to respondent's comprehensive pretrial discovery requests. (J.A. 17-19). The pretrial discovery motion included specific request under *Brady* v. *Maryland*, *supra*, (J.A. 18), *and* "information concerning any deals, promises or inducements made to witnesses in exchange for their testimony". (J.A. 18). The clear import of the request was receipt of information concerning any inducements, monetary or otherwise, made to the witness which might color testimony. The government quite obviously understood the import of the request. By providing affidavits from the witnesses stating that no rewards or promises of reward had been made, the government quite clearly evidenced its understanding that the request was for information concerning remuneration or consideration of any type which might tend to color the testimony of the witnesses. Notwithstanding this specific response to a specific request, the petitioner advances what can charitably be described as a disingenuous argument to the effect that the respondent's discovery request was a general request within the meaning of *United States* v. *Agurs*, *supra*. (Pet. Brief at p.20; p.9, n.14). This argument is troubling not because it has merit but because it has been advanced. The meaning of the request was quite clearly comprehended by the government *at the trial level*. At the trial level, both parties deal with the practicalities of preparation without parsing each sentence of a pleading in hope of finding a means to avoid a properly advanced request. That the petitioner would attempt to do so here undermines the credibility of its position.

Petitioner's argument that the request was not "specific" fails for yet another reason. Specific requests are favored in order to put the prosecution on notice as to

what information in its possession might be considered favorable by the defense in preparation for trial. The notice problem does not arise in cases involving promises of consideration, remuneration, or favorable treatment. The prosecutor does not need to know the defendant's theory of the case to recognize the value of information concerning payments made or contemplated to a witness. He or she knows that the witness's testimony is important to the government's case otherwise promises of consideration would have been unnecessary. See, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 Harv. L. Rev. 887, 895-96 (1981). There could have been no doubt about the meaning of the request in this case. The response of the government to the discovery request is clear evidence of the same. As noted in *Agurs*, "the prudent prosecutor will resolve doubtful questions in favor of disclosure". 427 U.S. at 108.[17]

There can be no question but that the government understood its obligation of disclosure. The government did more than fail to disclose properly discoverable information concerning bias and motive for falsification. The government, at least negligently, mislead the defense by indicating that there were no promises of reward. As a result of that deception, the defense of the respondent

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[17] After speciously arguing that the request in this case was not specific, the petitioner spent considerable time arguing that "specific request" cases should be analyzed under the same standards set forth in the third category of cases outlined in *Agurs*. [Pet. Brief pp.25-31]. This argument was rejected by the court in *Agurs*, at pp.106-07, 111. While it is understandable that the petitioner would be delighted with a relaxation of standards for review of prosecutorial misconduct, its argument is unpersuasive and, we submit, should not result in reversal of the reasoning set forth in *Agurs*.

was materially impacted. The forceful opinion in *Davis* v. *Alaska*, *supra*, leaves no doubt as to the significance of cross-examining a key prosecution witness on the issue of bias or possible motive for falsification. In *Davis*, the defendant was unable to cross-examine concerning motive. Here, the defendant wholly abandoned any attempt to discredit the testimony of the government's key witnesses because of the representations by the government that there existed no evidence concerning remuneration or expectation of compensation. The trial court found "with respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show the controlled substances in question came from supplies which had been prescribed for defendant's own use." Pet. App. at 8A. The misrepresentations of the government resulted in no cross-examination of the only government witness as to bias or motivation for falsification. It is difficult to conceive of an example more closely aligned with the reasoning of *Davis*. Both cases involve limitations on the right to cross-examination. Both cases involve limitations on cross-examination directed toward revealing possible biases, prejudices or other ulterior motives. *Davis* involved a judicially imposed limitation. This case involves limitations occasioned by intentional or negligent misrepresentations of the government. The end result is the same. Both defendants were denied their constitutional right to full and effective cross-examination. In *Davis* this limitation was seen as fatal because the limited cross-examination went to the key prosecution witness. However, in *Davis* there was circumstantial evidence coroborative of the witness' testimony. In this case, the evidence adduced at trial relevant to the drug count for which respondent was convicted came *solely* from the

mouths of the witnesses who were protected from effective cross-examination through the government's misrepresentations.

It is often difficult to quantify the harm resulting from the prosecution's withholding relevant evidence. For this reason the courts are slow to speculate as to whether the withheld materials could have been used effectively at trial. *Goldberg* v. *United States*, 425 U.S. 94, 111 (1976). In *Clancy* v. *United States*, 365 U.S. 3212, 316 (1961) this Court found "since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively".

Rather than speculate as to what a jury may or may not have done, it is the responsibility of this Court to re-examine the evidentiary basis on which the lower court's conclusions are founded. *Niemoto* v. *Maryland*, 340 U.S. 268, 271 (1951). Re-examination of the full record allows this Court to take into consideration the peril noted by the petitioner in its brief concerning the impact of non-disclosure on a defense. Petitioner appropriately concedes that

> An incomplete response to a specific request not only deprives the defendant of certain evidence but has the effect of representing to the defendant that the evidence does not exist. The defendant may, as a result, abandon certain defenses or certain lines of inquiry that he would otherwise have pursued. It may then be difficult for a defendant, in post-trial proceedings, to reconstruct the course that his defense in the trial would have taken and to demonstrate that he would have created a reasonable doubt about his guilt. This can happen even if, as in this case, the incomplete response is given in complete

> good faith and without any intention of misleading the defense."

Pet. Brief at p.31.

The peril outlined by the prosecution is precisely what occurred in this case. The defense was led to believe that there existed no evidence concerning the possibility of bias on the part of the governments two key witnesses. Accordingly, effective cross-examination was not only limited, it was abandoned. The result was conviction. That the district court characterizes the witnesses testimony as "exculpatory" is contradicted by its verdict. The unobstructed testimony of the witnesses resulted in the conviction of respondent. This logic was correctly advanced by the court of appeals. Based upon the government's non-disclosure of properly discoverable impeachment materials, the court found that respondent's right to a fair trial and to effective cross-examination were materially and negatively impacted. Accordingly, the convictions were properly reversed.

V

CONCLUSION

For the foregoing reasons we respectfully submit that the court of appeals correctly found that the government's nonfeasance in this case materially interfered with respondent's constitutional right to a fair trial. The resulting reversal of respondent's convictions was the proper result. Therefore, we request that the decision of the court of appeals be affirmed.

Respectfully submitted,

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(Appointed by this Court)
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REPLY

BRIEF

(5)

No. 84-48

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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

HUGHES ANDERSON BAGLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The court of appeals' explicit holding was that "the government's failure to provide requested *Brady* information to [respondent] so that he could effectively cross-examine two important government witnesses requires an automatic reversal" (Pet. App. 5a-6a). In our opening brief, we demonstrated that the court of appeals' "automatic reversal" approach — under which the court required no showing of the materiality of the undisclosed evidence — is utterly inconsistent with this Court's decisions. U.S. Br. 10-17. We further urged that the standard of materiality used for determining whether a conviction must be set aside because the government did not make a complete response to a specific defense request for information should be less strict than the "beyond a reasonable doubt" standard that the district court found to be satisfied here. U.S. Br. 18-41.

Respondent makes no serious effort to defend the court of appeals' "automatic reversal" rule; instead, he asserts that the court of appeals' use of that phase was "superfluous" (Resp. Br. 21).[1] But respondent also fails to show that the ATF form contracts that the government failed to disclose were in fact material to this prosecution. Respondent simply asserts in general terms that the government's failure to deliver the form contracts to the defense materially affected the defense case (see, *e.g.*, Resp. Br. 19-20, 24-26); like the court of appeals, respondent identifies nothing in the record that suggests that disclosure of the form contracts would have significantly impeached the testimony of O'Connor or Mitchell, and, again like the court of appeals, respondent provides no justification whatever for disturbing the ruling of the district court judge, who stated that he would have found respondent guilty even if he had known of the form contracts.[2]

Instead, respondent's principal tactic appears to be to assert that the government affirmatively misled his trial counsel by making false representations. In this connection, respondent repeatedly refers (see Resp. Br. 2 & n.3, 5 n.9, 18-19, 22, 24) to affidavits, executed by O'Connor and Mitchell during the investigation of respondent, that detailed the affiants' dealings with respondent;[3] these affidavits were

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[1]Our citations to respondent's brief refer to the typescript; the printed copy was unavailable when we filed this reply.

[2]Respondent's assertion (Br. 5 n.9) that the testimony of O'Connor and Mitchell was the sole basis of his convictions is incorrect; the evidence that formed the basis of nine of the eleven counts on which respondent was convicted was uncovered during a search of respondent's residence. See VI Tr. 1039 (government counsel stated, without defense objection, stipulation that controlled substances were uncovered in a search of respondent's residence); *id.* at 1107-1108.

[3]The affidavits appear at E.R. 64-85 and are also appended to respondent's motion for collateral relief, a copy of which we lodged with the Clerk of this Court when we filed our opening brief.

delivered to respondent before trial in response to his discovery requests.[4] Each affidavit concluded with a paragraph similar to the following:

> I have read the foregoing statement consisting of 4 pages, each of which I have signed. I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief. * * * I made this statement freely and voluntarily without any threats or rewards, or promises of rewards having been made to me in return for it.

E.R. 65; see E.R. 66, 70, 72, 74, 77, 79, 82. 84. Respondent describes these statements as "materially false representations" (Br. 2 n.3), "false statements which led respondent to believe that the [trial] testimony [of O'Connor and Mitchell] could not be discredited" (Br. 5 n.9), and "misrepresentations" that "indicate[ed] that there were no promises of reward" (Br. 24).

We showed in our opening brief that these statements in the affidavits were not false at all. U.S. Br. 3 n.4. Moreover, while the court of appeals incorrectly characterized these statements (Pet App. 2a), it did not assert that they were false, and it appears to have attached no significance to them; it based its "automatic reversal" squarely on the nondisclosure of the ATF form contracts, not on any suggestion that the government misled respondent.[5] Indeed, it

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[4]Respondent asserts (Br. 2, 22-23) that the affidavits were delivered in response to the discovery request that was the basis of the court of appeals' ruling, a request for "any deals, promises, or inducements made" to government witness "in exchange for their testimony" (J.A. 18; see Pet. App. 2a). But the affidavits make no reference to trial testimony, and it is evident that they were in fact delivered in response to respondent's request for "all Jencks Act material" (J.A. 18).

[5]See, *e.g.*, Pet. App. 1a (asserting that this case concerns the "nondisclosure of impeachment evidence"); *id.* at 2a-3a ("the prosecutor's failure to produce information material to the credibility of key

is not apparent from the record that the affidavits were even introduced into evidence at the trial. But because respondent has attached such significance to these affidavits — emphasizing them far more heavily than the ATF form contracts that were the basis of the court of appeals' decision — we consider it appropriate to review the facts that demonstrate that the affidavits were not inaccurate or misleading in any way.

The boilerplate language in the affidavits represented that O'Connor and Mitchell had not received or been promised rewards for executing the affidavits. There is no finding, and no evidence, that either O'Connor or Mitchell ever received or was promised a reward in connection with the affidavits. Well after the trial — and therefore long after the dates on which they executed the affidavits — O'Connor and Mitchell were compensated for their services in connection with the investigation of respondent. But the fact that a law enforcement officer has received legitimate compensation for helping to conduct an investigation does not mean that a statement he made about his role in the investigation was given "in return for" a "reward." Moreover, the district court found that O'Connor and Mitchell received no promises of compensation (see Pet. App. 7a, 11a-12a); therefore, O'Connor and Mitchell had not received *any* "rewards, or promises of rewards" for *any* purpose at the time they executed the affidavits. The district court remarked that O'Connor and Mitchell may have entertained a subjective

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government witnesses"); *id.* at 3a (referring to the government's duty "upon specific request * * * to disclose information favorable to the accused"); *id.* at 4a ("The government's failure to disclose this *Brady* information inhibited [respondent's] ability effectively to cross-examine two important prosecution witnesses."); *id.* at 5a ("the government's failure to provide requested *Brady* information").

expectation that they would be compensated for their services (*id.* at 7a), but nothing in the affidavits is remotely inconsistent with their having had such a purely subjective expectation of compensation for this purpose.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1985